

10 Ka

AN

Analysis

OF THE

PRACTICE OF THE COURTS

OF

King's Bench and Common Pleas.

WITH

Some OBSERVATIONS on the MODE of
Passing FINES and Suffering RECOVERIES.

K

By BAKER JOHN SELLON, Esquire,
OF THE INNER-TEMPLE.

L O N D O N :
PRINTED BY HIS MAJESTY'S LAW PRINTERS,
FOR T. WHIELDON, FLEET-STREET.
MDCC LXXXIX.

13

316 287C



ADVERTISEMENT.

THE following pages are an *Analysis* or Sketch of a larger Work now preparing for the press. Notwithstanding the numerous books of practice which have been published, it was presumed, that one compiled upon the plan here suggested, would be instructive to the student, and useful to the profession. The general division of the work will appear to be into four parts. 1st. The Mode of proceeding in all *common Cases*, from the Commencement of a Suit to final Judgment and Execution. 2d. Of Proceedings by and against *particular Persons*. 3d. Of Proceedings in *particular Actions* and *Cases*. And, 4th. Of *detached Heads of Practice*, not included in either of the other Parts, with some Observations on the Mode of *passing Fines* and *suffering Recoveries*. The subject will be more particularly treated of by endeavouring, 1st. To explain the *nature* and *meaning* of the respective stages of a suit. 2d. To shew *how to proceed* therein. And, 3d. To arrange, by way of illustration, under the head of *Practical Remarks*, the most material cases that have been decided thereon. It was the Compiler's intention, and indeed his full expectation, to have completed the work by this time, but having been prevented from so doing by unavoidable engagements, and understanding that an *epitome* of the practice was now in much request, he was induced to commit this *Analysis* to the press; which, although originally designed merely as the outlines of another work, will, he trusts, be deemed not altogether unacceptable by way of guide to the practitioner.

N^o 7, King's Bench Walk, Temple,
June 6th, 1789.

B. J. S.

INTRODUCTORY REMARKS

UPON THE

STATUTES

RELATIVE TO

ATTORNIES.

Of serving their Clerkships, and being admitted.

THE legislature, in order to prevent ignorant and unqualified persons from acting as attornies, hath wisely imposed the following restrictions and regulations:

Every person intending to be admitted as an attorney, must be bound by contract in writing to serve as clerk for the space of five years, to some attorney duly and legally sworn and admitted. 2 G. II. c. 23. § 5.

Within three months after the date of such contract, he must cause an affidavit to be made, and duly sworn, of the actual execution of such contract by himself, and the attorney to whom he is so bound, specifying in the affidavit their names and places of abode, and the date of the contract. 22 G. II. c. 46. § 3.

Which affidavit must be filed by the proper officer of the respective courts (in **S. B.** the chief clerk, or his deputy; in **C. B.** the clerk of the warrants, or his deputy), who must also keep books for entering the names and places of abode of every such attorney or clerk. Ib. § 5, 6.

And before the admission of such clerk as an attorney, this affidavit, marked by the proper officer, must be produced and read in court. Ib. § 4.

Such clerk must be *bonâ fide* and actually employed by such attorney in the proper business, practice, and employment of an attorney during the whole time or term of service. Ib. § 7.

But in case the attorney to whom he is bound should die before the end of his clerkship, or should leave off business, or they should cancel the contract by mutual consent, or the clerk should be discharged by a rule or order of court, and he should afterwards be bound, by another contract in writing, to serve, and should actually serve, some other regular attorney during the residue of the five years, such service shall be

as good and effectual as if he had served the attorney to whom he was originally bound; provided an affidavit of such *second* contract be duly made and filed within the time, and in manner directed concerning the *original* contract. 2 G. II. c. 23. § 9.

Every clerk before his admission, or the attorney to whom he was bound, shall make an affidavit, that he has actually and really served such attorney for the whole term of five years. *Ib.* § 10.

Serving five years to a solicitor in Chancery, or to a prothonotary or secondary, good. 23 G. II. c. 46. 2 G. II. c. 23.

A Quaker may, under the above restriction, be admitted an attorney on his affirmation. 12 G. II. c. 13. § 8.

Having prepared the affidavit of service, as above mentioned, apply to the proper officer who filed the affidavit of the due execution of your articles, to attend you with the same at the judge's chambers. The judge will examine you as to your qualifications; and if he approve, will give his *fiat* for your admission. The same officer who attended you, will take the *fiat* and make out your admission upon proper stamps. You then attend at Westminster-hall some day in term to be sworn, and have your admission signed by the judge who examines you; and the master in *B. B.* or clerk of the warrants in *C. B.* will afterwards enter your name on the roll.

The whole expence is about 10*l.*

¶ The above statutes must be strictly complied with.

The contract, or articles, must be to serve and be instructed in the business of an attorney, and not of a scrivener, or the like, otherwise the mere binding to an attorney is of no avail. *Bar.* 39, 40.

So, as to the *time* of service, if there be any discontinuance, without good cause, in the course of the five years, clerkship is void.

And although such clerk may fraudulently get admitted, the court will afterwards, on motion, order his name to be struck off the roll. *Black. Rep.* 991.

If a clerk who gave a consideration be discharged from the attorney before expiration of his time, he may have a proportionate part thereof returned on application to the court, who will refer the matter to the master, and order the attorney to refund according to master's certificate. 1 *Barnard* 334. 2 *Ib.* 227.

Of acting as an Attorney not being qualified.

Any person acting as an attorney not duly admitted and inrolled, to forfeit 50*l.* for every offence. 2 G. II. c. 23. § 24. and 22 G. II. c. 46. § 12.

Attornies acting as agents for persons not qualified, to be struck off the roll. 22 G. II. c. 46. § 11.

No man can be attorney for both parties, though by their consent, on pain of being struck off the roll.

If an attorney take upon him to prosecute or defend a suit without warrant or direction, court will grant an attachment against him.

Of changing Attornies in the Cause, and of the Attorney's Bill.

Attorney cannot be changed by his client without leave of court, or order of judge, on payment of his bill as taxed by master; and the new attorney must, at his peril, take notice of all subsisting rules in the cause. Do. 217. 7 Mod. 50.

An attorney has a lien on his clients deeds, papers, or money, for his bill. Do. 104. 238.

And may obtain an order to stop his client from receiving money recovered in a suit in which he was employed for him, till his bill be paid. Ib.

Attorney must deliver his bill, subscribed with his own hand, one month before action brought for recovery of same. 2 Geo. II. c. 23. § 23.

But it is not necessary that an attorney's bill should have been delivered a month to entitle him to *set it off* in an action brought against him; it being sufficient for that purpose if it has been delivered long enough to be taxed. Do. 199. n.

If an attorney's bill has been delivered a month, and not referred for taxation, the defendant in an action brought upon it shall not be permitted to question the reasonableness of the items upon trial. Do. 198.

Bill for conveyancing only, is not to be taxed; but if part be for conveyancing, and part for business done in court, the whole is to be taxed. Do. 199. n.

Of the List of Attornies.

An alphabetical book is to be kept by the master in **B. B.**—and the clerk of the warrants in **C. B.**—to be inspected *gratis*, wherein every practising attorney resident in London or Westminster, or within ten miles thereof, shall cause his name and *place of abode, or some other place** within the said cities, where he may be served with the proceedings of the court, to be entered; and as often as any attorney shall change the place where he may be served as aforesaid, he shall make the like entry thereof in the said book; and all proceedings which do not require a personal service, shall be deemed sufficiently well served, if copy thereof shall be left at the place last entered in such book, with any person there; and on no such entry being made, then fixing up any of the said proceedings in the King's Bench office shall be deemed sufficient service, unless personal service be required.

Of Attorney's Certificate.

By 25 G. III. c. 80. every attorney practising in any court holding pleas for 40s. and upwards, is annually to take out a certificate, for which, if he reside in London, Westminster, the bills of mortality, or Edinburgh, he is to pay 5l. if elsewhere, 3l.

* The words "*Place of abode, or some other place, &c.*" are thus explained: As many attorneys have no certain place of residence, any place where he may be served, though not his actual place of abode, is sufficient. But when name and place of abode is entered, then service at that place is the proper service. Loft. 357.

And for the easier obtaining thereof, every acting attorney shall annually deliver a note of his name and residence to the master of ~~B.~~ **B.** or clerk of the warrants in **C. B.** who are to enter the same, and to issue such certificates, which are to be in force for *twelve* calendar months from the date thereof, and to be renewed *ten* days before expiration.

Every attorney residing *forty* days in a year in London, Westminster, &c. shall be accounted *resident* there, so as to render him liable to the 5l. duty.

Persons acting without certificates, or giving in a false place of residence, to forfeit 50l. for every offence, to any one suing for the same.

Persons having taken out certificates, may act for others who have also taken them out.

Attorney having taken out one certificate, may act in any other court in which he is sworn.

Of the Memorandum of Warrant to prosecute and defend.

By the same statute, 25 G. III. c. 80. § 13. upon the suing out of any writ or process, there must be a memorandum, or minute of a warrant to *prosecute*, upon a 2s. 6d. stamp, filed with the proper officer.

So the attorney for defendant must have a like warrant to *defend*, which is also to be properly filed under the penalty of 50l. *Ib.*

In case of judgment by default or confession, a like warrant must be delivered some time previous to entering up judgment. § 19.

But though the memorandums of warrants should not be entered or filed, the action is to proceed, it being only the penalty incurred. § 17.

None of the duties are to be charged to the clients. § 20.

T A B L E

OF THE TERMS AND RETURNS IN B. R.

Michaelmas Term, which contains three weeks and two days, hath four Returns. It begins November 6th, ends November 28th (*except they fall on a Sunday, then the day following*).

By Original.

1. On the morrow of All Souls.
2. On the morrow of Saint Martin.
3. In 8 days of Saint Martin.
4. In 15 days of Saint Martin.

By Bill.

1. On () next after the morrow of All Souls.
2. On () next after the morrow of Saint Martin.
3. On () next after 8 days of Saint Martin.
4. On () next after 15 days of Saint Martin.

N. B. If writ be made returnable on the 11th November, being the feast of Saint Martin, say on Wednesday the feast of Saint Martin, or such day as it happens to fall on, that day in fact being neither in or upon any Return.

Hilary Term, which contains three weeks, hath four Returns. It begins January 23d, and ends February 12th (*except as before excepted*).

1. In 8 days of Saint Hilary.

1. On () next after 8 days of Saint Hilary.

2. In 15 days of Saint Hilary.

2. On () next after 15 days of Saint Hilary.

3. On the morrow of the Purification.

3. On () next after the morrow of the Purification.

4. In 8 days of the Purification.

4. On () next after 8 days of the Purification.

N. B. No process to be made returnable on the feast of Purification in this term, nor do the courts sit.

Easter Term, which contains three weeks and six days, hath five Returns. It begins Wednesday fortnight after Easter-day, and ends on Monday before Whitunday.

1. In 15 days of Easter.

1. On () next after 15 days of Easter.

2. In three weeks after Easter.

2. On () next after three weeks from the day of Easter.

3. In one month after Easter.

3. On () next after one month from the day of Easter.

4. In five weeks from Easter-day.

4. On () next after five weeks from the day of Easter.

5. On the morrow of the Ascension.

5. On () next after the morrow of the Ascension.

N. B. No writs to be returnable on Ascension-day in this term, nor do the courts sit.

Trinity Term, which contains twenty days, hath four Returns. It begins on Friday after Trinity Sunday, and ends the Wednesday fortnight after, except it be the 24th of June, then the next day.

1. On the morrow of the Holy Trinity.

1. On () next after the morrow of the Holy Trinity.

2. In 8 days of the Holy Trinity.

2. On () next after 8 days of the Holy Trinity.

3. In 15 days of the Holy Trinity.

3. On () next after 15 days of the Holy Trinity.

4. In three weeks after the Holy Trinity.

4. On () next after three weeks of the Holy Trinity.

N. B. No process to be returnable on Midsummer-day in this term (except it fall on the Friday after Trinity Sunday, then it is otherwise by stat.), nor do the courts sit.

T A B L E

OF THE TERMS AND RETURNS IN C. B.

Michaelmas Term, which contains three weeks and two days, hath four Returns.

By Original.

1. On the morrow of All Souls.
2. On the morrow of Saint Martin.
3. In 8 days of Saint Martin.
4. In 15 days of Saint Martin.

**By Attachment of Privilege,
Bill, &c**

1. On () next after the morrow of All Souls.
2. On () next after the morrow of Saint Martin.
3. On () next after 8 days of Saint Martin.
4. On () next after 15 days of Saint Martin.

Hilary Term, which contains three weeks, hath four Returns.

1. In 8 days of Saint Hilary.
2. In 15 days of Saint Hilary.
3. On the morrow of the Purification.
4. In 8 days of the Purification.

1. On () next after 8 days of Saint Hilary.
2. On () next after 15 days of Saint Hilary.
3. On () next after the morrow of the Purification.
4. On () next after 8 days of the Purification.

Easter Term, which contains three weeks and six days, hath five Returns.

1. In 15 days of Easter.
2. In three weeks of Easter.
3. In one month of Easter.
4. In five weeks of Easter.
5. On the morrow of the Ascension.

1. On () next after 15 days of Easter.
2. On () next after three weeks from the day of Easter.
3. On () next after one month from the day of Easter.
4. On () next after five weeks from the day of Easter.
5. On () next after the morrow of the Ascension.

Trinity Term, which contains twenty days, hath four Returns.

1. On the morrow of the Holy Trinity.
2. In 8 days of the Holy Trinity.
3. In 15 days of the Holy Trinity.
4. In three weeks of the Holy Trinity.

1. On () next after the morrow of the Holy Trinity.
2. On () next after 8 days of the Holy Trinity.
3. On () next after 15 days of the Holy Trinity.
4. On () next after three weeks of the Holy Trinity.

N. B. For the times when the terms respectively begin and end in C. B. and the non-judicial days in each term, see *ante*, The Terms and Returns in B. R.

Analysis

OF THE

Practice of the Courts

OF

King's Bench and Common Pleas.

PART I.

THE MODE OF PROCEEDING *in common Cases*, FROM THE COMMENCEMENT OF A SUIT, TO FINAL JUDGMENT, AND EXECUTION.

OF ACTIONS IN GENERAL.

ACTIONS ARE EITHER *BAILABLE* OR NOT *BAILABLE*.

The first thing to be known therefore at the commencement of a suit is, whether defendant ought to be arrested, or only served with process. To discover which it is necessary to consider,

IN WHAT CASES SPECIAL OR COMMON BAIL IS REQUIRED.

This depends upon the nature of the cause of action, and its objects; and herein of the stat. 12 G. I. c. 29.—Also upon the persons who are sued, as,
1. *In what capacity they are sued.—2. Whether privileged, or not.—*
3. *Whether protected to a certain degree.—And further, upon particular circumstances, which may exempt persons from special bail, who would otherwise be liable thereto.*

PROCESS IN ACTIONS NOT BAILABLE.

If it appear that the cause of action is not bailable, having prepared your warrant to prosecute agreeable to 25 G. III. *ante* p. 4.

B. B.

If defendant live in Middlesex, proceed by bill of Middlesex; if elsewhere, by latitat.

Bill of Middlesex.] Get a blank bill, fill it up, make out a præcipe; take the bill, præcipe, and warrant to prosecute, to the Bill of Middlesex-office, and the officer will sign it; it is not to be sealed, pay signing 6d. in term—10d. in vacation.

Præcipe and warrant are left in the office.

If not executed before return, sue out an alias, and afterwards a pluries; signing each in term or vacation 2d.

Non omittas.] If defendant live in any liberty, sue out *non omittas* bill; pay same as common bill.

Latitat.] Get a blank, fill it up, make out a præcipe, carry them with warrant to prosecute to **B. B.** office; officer will sign same. Pay 2s. 6d. Latitat must be sealed also. Take it to the seal-office. Pay 7d. Leave the præcipe and warrant at **B. B.** office.

If not executed before return, sue out an alias, and afterwards a pluries. Pay nothing for signing either; 7d. sealing each.

If defendant live in a liberty, sue out *non omittas*. Signing 2s. 6d. sealing 1s. 2d.

The pluries may be continued from term to term till executed. But if defendant lies by for four terms, then fresh bill of Middlesex, or latitat, must be sued out.

No more than four defendants may be put into one writ.

Practical Remarks.] *The nature and extent of the bill of Middlesex.—Latitat and capias.—At what time they may be taken out.—How the parties should be named, and the cause of action expressed therein.—Their teste and*

C. B.

Proceed by *capias*. Make a præcipe, take it to the proper filazer, and the warrant to prosecute, he will make out the *capias*, and at his leisure afterwards procures the original writ to warrant it, which he returns and files of course. Pay him 2s. 2d. sealing 7d.

If not executed before return, sue out a *capias* by continuance.

Non omittas.] If defendant live in any liberty, as the Cinque Ports, &c. sue out a *non omittas*. Make a præcipe, &c. as before. Pay filazer for signing same 8s. 6d. sealing 1s. 2d.

And if not executed before return, sue continuances as before.

and return.—How far to be considered the commencement of a suit.—In what manner to be pleaded.—Of cravingoyer of and amending the original writ.—Of the manner of directing writs.

OF THE NOTICE.

To the bill of Middlesex, latitat or capias, is subscribed a written notice, mentioning the day wherein defendant is to appear thereto; and upon all process the attorney's name and place of abode, and day of issuing same, must be indorsed or subscribed.

OF THE SERVICE OF PROCESS.

In all actions not bailable, defendant is to be served with a copy of the process.

It ought to be a personal service, though under some circumstances not necessary. It may be served on the return day. If many defendants, all ought to be served.

Questions frequently arise on the irregularity of service of process.

Practical Remarks.] *In what manner it ought to be served.—In what cases a personal service will be dispensed with.—Of the time of serving same.—How defective process, or irregular service, cured and amended.*

OF DEFENDANT'S APPEARANCE.

Having prepared warrant to defend according to 25 G. III. ante p. 4. appearance is effected,

B. B.

By filing Common Bail,

Upon a treble 6d. stamped parchment, with clerk of common bail in **B. B.** office, pay in term, or within six days after, 1s. 2d. If afterwards, 1s. 6d. the extra 4d. being for a post term, and to be filed the term writ is returnable.

But you do not pay for another post term till the vacation of the subsequent term after writ is returnable. File warrant to defend with it,

C. B.

By entering an Appearance,

Written on unstamped paper, and filed with the filazer of the proper county where writ was sued out, which is entered by him in a book kept for that purpose; pay 2s. 6d. if one defendant; if more sued jointly, 2s. 6d. for the first, and 4d. every other; if sued separately, 2s. 6d. each defendant. File warrant to defend with it.

If proceedings be by or against attornies, &c. appearance is then entered with prothonotary.

When to be filed and entered.

In eight days after the return of process, exclusive of the return day; if returnable the 6th, must be filed or entered 14th.

OF PLAINTIFF'S APPEARING FOR DEFENDANT ACCORDING TO STATUTE.

At the expiration of the 8 days, if defendant do not appear, an affidavit of the service of process being made (which may be sworn in *town* before a judge, or the officer of the court for entering such appearance; if in the *country*, before a commissioner, and be filed *gratis*), plaintiff may appear for him by filing common bail in **A. B.** or entering appearance in **C. B.** as above mentioned, only adding (*filed according to the statute*).

Practical Remarks.] *How the affidavit must be made.—At what time appearance may be entered by plaintiff.—When defendant must complain of irregularity in entering same.*

HAVING SHEWN THE MODE OF BRINGING DEFENDANT INTO COURT IN ACTIONS *NOT BAILABLE*, EITHER BY HIS VOLUNTARY APPEARANCE, OR BY PLAINTIFF APPEARING FOR HIM ACCORDING TO THE STATUTE, IT IS NOW TO BE CONSIDERED IN WHAT MANNER DEFENDANT IS TO BE BROUGHT INTO COURT IN *BAILABLE* ACTIONS; AFTER WHICH THE FUTURE PROCEEDINGS IN BOTH SUITS MAY BE TREATED OF UNDER ONE HEAD, THERE BEING NO MATERIAL VARIATION THEREIN FROM THE DECLARATION TO JUDGMENT.

OF THE AFFIDAVIT TO HOLD TO BAIL.

If the action be of a *bailable* nature, the first step to be taken is, for plaintiff (agreeable to statute 12 Geo. I. c. 29.) to make an affidavit of his cause of action, in order to arrest defendant thereon.

How to be made.

It should be made on a treble 6d. stamp paper, and may be sworn in *town* before a judge, or the officer, or his deputy, who issues the process; and in the *country*, before a commissioner. Oath 1 s.; nothing filing.

So tenacious is our law of the liberty of the subject, that the courts will not suffer any evasion or uncertainty in such affidavits, and have made various restrictions and regulations concerning them.

Practical Remarks.] *The nature of the affidavit.—Its certainty.—By whom to be made.—Before whom.—How and when to be filed.—How to be stamped, and of joining several defendants, and causes of action, in one affidavit.—Of counter and supplemental affidavits.*

OF PROCESS IN BAILABLE ACTIONS.

The affidavit being sworn, and warrant to prosecute prepared, proceed to sue out your process, in *both courts*, in the same manner as in actions not bailable, *ante* p. 8.; only insert therein, an *ac etiam*, agreeable to the nature of the action; and indorse sum sworn to, together with attorney's name and place of abode, and day of suing out writ.

N. B. In **C. B.** formerly, if defendant lived in one county, and you would try the cause in another, and the action was bailable, it was necessary to make out a *testatum capias* into the county where defendant lived;

lived; otherwise plaintiff lost his bail by declaring out of the county. But now the practice is otherwise, and plaintiff may declare in a different county from that in which arrest was made; and it shall not be a waiver of bail. So that the *test. cap.* is in effect rendered useless. *Vide the Practical Remarks, p. 8.*

OF THE WARRANT AND ARREST.

Take writ, if defendant is to be arrested in London, to one of the compters, get a warrant thereon; if elsewhere, go to the proper sheriff's office for warrant, which deliver to a sheriff's officer, who will arrest defendant.

Practical Remarks.] *The nature and contents of the warrant.—Of the execution thereof.—Of the necessity of the warrant before arrest.—Of the justification of the officer under it.—What constitutes an arrest.—Of the power of the officer.—When and by whom it ought to be made.—What ought to be done at the making thereof.—Of the sheriff's fees upon an arrest.*

OF BAIL TO THE SHERIFF.

When defendant is arrested, he must either remain in custody, or find two good sureties, who, together with him, enter into a bond to the sheriff, conditioned for defendant's appearance at the return of the process. And this is called giving bail to the sheriff, or bail below.

Practical Remarks.] *Of the nature and origin of giving bail to the sheriff.—Of the method of putting in bail,—and herein, Of the statute 23 Hen. VI. which more especially concerns the conduct of sheriffs in this particular, and the form of the condition of the bail-bond.*

OF SPECIAL BAIL TO THE ACTION.

Upon the return of the process, if defendant appear according to the condition of the bail-bond, he must do so by putting in *special bail to the action*, called bail *above*, this being the only way of performing the condition.

When to be put in.

If defendant were arrested in London or Middlesex, in *four days* (exclusive) after return of writ in **R. B.** or after appearance-day in **C. B.** If arrested in any other county,

R. B.

In *six* days.

C. B.

In *eight* days.

But if Sunday be the last of these days, then on the next day.

In **R. B.** the bail *below* may be bail *above*, and cannot be excepted against. But not so in **C. B.**

How to be put in.

1. In Town.

R. B.

If the suit be by bill, go to the office where writ was signed, or to the sheriff's office, for short copy thereof,

C. B.

Carry an abstract of writ, names of bail, &c. to filazer, who will enter them in his book, and he or his

thereof, together with the sum sworn to; get a special bail-piece at stationer's, pay for same 2s. 1d. fill it up with the name of the county, bail, &c. carry it to a judge's chamber, and, having the bail with you ready, judge's clerk will take the bail. Pay 4s. in term, 5s. in vacation.

Bail-piece is filed at judge's chambers.

If suit be by original, bail is taken by filazer.

Always carry with you the warrant to defend, and give same to judge's clerk, or filazer, according to 25 Geo. III. *ante* p. 4.

his clerk will attend at judge's chambers with the bail to take recognizance, which is done by an entry in filazer's book. In filazer's absence, or if he cannot attend, recognizance may be taken before a judge on a double 1s. stamp parchment.

If suit be by privileged person, clerk of declarations will take recognizance. Pay filazer in term 12s. in vacation 19s.; if at judge's house, 3s. 4d. more.

2. In the Country.

B. B. and C. B.

Carry bail-piece, as before directed, to a commissioner of the proper court, who will take recognizance. Pay in **B. B.** 6s. in **C. B.** 2s. At same time you may make an affidavit of the justification of the bail on treble 6d. stamp, which may be sworn before the same commissioner. Then take an affidavit of such bail being duly put in, on treble 6d. stamp, and swear it before *some other* commissioner. After which annex bail-piece thereto, and send the whole to the agent in town, to get it allowed and filed. When the agent receives the same,

B. B.

He files the bail-piece, with warrant to defend, according to 25 Geo. III. and the affidavit of due taking thereof with one of the judges of the court. Pay in term 4s. in vacation 5s.

It remains there till bail perfected.

C. B.

He applies to a judge for his allocatur; pay 5s. in term; in vacation 12s. and then files the same with the filazer of the county where bail was taken. Pay 6s. in term or vacation.

When Bail-piece to be transmitted.

If taken by a commissioner within 40 miles of London or Westminster, it ought to be transmitted to a judge of the court, to be by him allowed.

B. B.

In 8 days after caption.

And if taken above 40 miles from London and Westminster,

B. B.

In 15 days.

C. B.

In 10 days after caption.

C. B.

In 20 days.

Unless the judges be all on their circuits, and then so soon as any of them return to London. When received by agent in town, to be filed as above mentioned.

Notice of Putting in Bail.

Upon special bail being put in, either in *town* or *country*, notice thereof should, without delay, be given to plaintiff's attorney. In the latter case, it is usual with the notice to send the affidavit of caption, and of the justification.

OF EXCEPTING TO BAIL.

If plaintiff do not approve of the bail put in, he may except against them, and compel them to justify; which is by swearing, that, after all their debts are paid, they are worth double the sum they are bail for.

Of the Time of Exception.

In *town* causes exception must be made within twenty days after notice of putting in bail; otherwise void, and bail becomes absolute. In *country* causes, within twenty days after notice of bail being filed.

Of the Manner of Exception.

B. B.

C. B.

If the suit be by bill, it is to be made in the bail-book at the judge's chambers.

In *town* causes in the filazer's book; in *country* causes, under bail-piece, filed with the proper filazer of the county.

If by original, at the filazer's.

Of the Notice of Exception.

After exception made, notice thereof in writing must be given to defendant's attorney.

OF JUSTIFYING, ADDING, AND PERFECTING BAIL.

If notice of exception be given in *term*, bail must justify in 4 days after such notice, or defendant must add other bail, who must justify within that time. But if exception and notice be in *vacation*, bail put in, or the bail added, must justify on the first day of the subsequent term.

Of Notice of Justifying.

B. B.

C. B.

If the bail already put in are to justify, *one* day's notice is sufficient.

Two days notice in all cases.

But if other bail are added, *two* days.

The two days are reckoned; one *exclusive*, and the other *inclusive*. Notice on 12th for justification on 14th.

Sunday is no day; therefore, notice on Saturday for Monday is not good.

Notice should express particularly the names and descriptions of the bail.

That

That A. B. or two of them, will justify, bad.

In **C. B.** notice that three will justify, bad; but held otherwise in **B. R.**

Where to Justify.

In court, unless by consent; then at judge's chambers.

1. If in Court.

B. R.

Get the clerk of the judge before whom bail was taken to bring bail-piece into court. Pay 2s. 6d.

C. B.

Get the filazer to attend with bail-book, or bail-piece. Pay 5s. 4d.

Having prepared and got sworn an affidavit of the service of notice of justification, let the bail be ready with you in court. Give brief to counsel or serjeant, with 10s. 6d. to move to justify. Bail are then brought into court and sworn, for which pay 9s.; and a rule for the allowance thereof is afterwards drawn up by clerk of rules in **B. R.** pay 4s.; or secondary in **C. B.** pay 4s. 6d.; a copy whereof is to be served on plaintiff's attorney; and, in **C. B.** the original rule ought to be shewn to him at the same time.

If bail were taken in the *country* before a commissioner, and an affidavit of justification made and sworn as above mentioned, the same is read in court for justification.

2. If before a Judge.

B. R.

Bring the bail to judge's chambers, where bail-piece remains till they be perfected; and let them justify. Pay 2s.; and, usually, attorney for consent, 10s. 6d.

C. B.

Get filazer to attend at judge's chambers, and have the bail there. Pay 5s. 4d. and attorney 10s. 6d. as consent-fee.

In *country* causes the usual way is to accept the justification by filing the affidavit thereof (if sent up with the bail-piece) with the judge's clerk in **B. R.** or filazer in **C. B.** at the time of filing bail-piece; but if not sent up at that time, to file same afterwards with proper officer. Consent-fee, 10s. 6d.

The subject of putting in, excepting against, and perfecting bail, being very comprehensive, and the practice relative thereto not a little intricate, it was thought proper, as well for the sake of perspicuity as of brevity, not to interrupt the mode of proceeding by inserting, under each head, the particular practical remarks belonging thereto. Let it in general be observed, that the principal cases determined upon any point of practice respecting bail, ought to be arranged under the particular stage of the process to which they refer.

OF SURRENDER IN DISCHARGE OF BAIL.

1. If Defendant be at large, or out upon his Bail,

Defendant may either voluntarily surrender himself, or bail may take him to judge's chambers. Judge's clerk will, in both cases, take the render.

render. Plaintiff's attorney must have immediate notice of render in writing, and an affidavit must be made of the service thereof; on producing which, the officer who hath the custody of the bail-piece, or recognizance, delivers same to the attorney to be filed, or discharges bail in his book (*as case may be*). Another copy of render is made out, and signed by a judge, which is carried with defendant (a tipstaff being got to attend him) to the marshal, warden, or gaoler, who will give a certificate that defendant is in his custody. Carry certificate, with bail-piece or recognizance, to the signer of writs in **R. B.** or filazer or prothonotary in **C. B.** (*as case may be*), who will file certificate, and thereupon discharge bail-piece or recognizance. Then (if in **R. B.**) enter commitment in clerk of judgment's book, and render is complete. Under the commitment must be added state of cause at the time of render. If before declaration, *sum sworn to on arrest*; if after declaration, add *declaration filed or delivered*, or *issue joined*, or *interlocutory judgment signed*; as case may be.

2. If Defendant be in Custody at another's Suit.

Make out habeas (for which *vide post*, tit. Habeas); lodge it with gaoler in whose custody defendant is, and he will bring him into court, or to a judge's chambers (*as case may require*), either to render himself, or for bail to render him. Same steps to be taken to complete render as where defendant is at large; only habeas, and return thereof, is left with judge; and return of habeas marked on surrender signed by him, which is carried over to gaoler, into whose custody defendant is rendered.

Practical Remarks.] *What necessary to be done before surrender.—How to proceed in case bail-bond be assigned.—At what time or stage of a suit bail ought to render principal.—Of the power of bail in taking their principal to surrender him.*

WE HAVE HITHERTO SUPPOSED THAT DEFENDANT, AGREEABLE TO THE CONDITION OF THE BAIL-BOND, APPEARS AT THE RETURN OF THE WRIT, BY PUTTING IN SPECIAL BAIL IN DUE TIME, AND HAVE SHEWN HOW TO EXCEPT AGAINST, JUSTIFY, ADD TO, AND PERFECT SUCH BAIL; BUT IF HE SHOULD FAIL IN THIS HIS APPEARANCE, AND NEGLECT TO PUT IN AND JUSTIFY BAIL, PLAINTIFF HAS TWO REMEDIES AT HIS ELECTION; THE ONE, BY HAVING THE BAIL-BOND ASSIGNED TO HIM, AND GOING AGAINST THE SURETIES MENTIONED THEREIN; THE OTHER, BY PROCEEDING AGAINST THE SHERIFF, TO COMPEL HIM TO PUT IN GOOD BAIL.

I. OF THE ASSIGNMENT OF BAIL-BOND.

When to be Assigned.

If arrest be in London or Middlesex, at any time after four days, *exclusive* of the return of the writ in **R. B.** or appearance-day in **C. B.**

If arrest be in any other county,

R. B.
Six days.

C. B.
Eight days.

The

The days are reckoned both *exclusive*; and where the last day is Sunday, party has all the next day to put in bail. So that if process be returnable on Wednesday, bail-bond cannot be assigned till *after* Monday.

How to get Bail-Bond assigned.

If in *Middlesex*, apply to under-sheriff, at his office in Took's Court; if in *London*, to the secondary of the comptroller where bail-bond was taken; if in the *country*, to the under-sheriff of the county; who are bound to indorse assignment thereon, and deliver it to plaintiff, or his attorney applying. After assignment get it stamped with a double 6d. stamp, and sue out writs against bail and principal as in other cases.

Practical Remarks.] *By whom and where to be assigned.* By sheriff or under-sheriff; but not under-sheriff's clerk. It may be assigned out of his county.

How the action to be brought. Venue may be either where bail-bond was entered into, or assignment made; but in same court where bail was given.

What necessary to be stated. Not the arrest, as it is not traversable.

Of the requisite caution in taking assignment of bail-bond. Plaintiff having made his election of his remedy, by taking such assignment, though the bail below should prove not responsible men, he cannot afterwards resort to the sheriff.

Of Staying Proceedings on Bail-Bond.

Take out summons to shew cause why proceedings should not be stayed upon payment of costs; and an order will be obtained upon such terms as judge may deem proper.

In this case bail must be put in and justified in original action.

If bail-bond has been irregularly assigned, move the court to set same aside, which will be done with costs.

Practical Remarks.] *The usual terms of staying proceedings on bail-bonds.—Of the bail-bond standing as plaintiff's security.—For what neglect or irregularity court will order proceedings to be set aside.—How defendant in original action must plead after staying proceedings on bail-bond.—What is, or is not, a waiver by plaintiff of the proceedings on bail-bond.*

2. OF RULING THE SHERIFF.

If plaintiff do not approve of the sureties in the bail-bond, and refuse to take an assignment thereof, he may resort to his remedy against the sheriff, and compel him to put in good bail; which is done by first *ruling the sheriff to return the writ*.

This is a *four day* rule in *London* or *Middlesex*, and *six days* elsewhere. If he return it with a *cepi corpus*, he ought at the same time to put in good bail; if not, he may be again *ruled to bring in the body*; which rule is a *four* or *six day* rule, as the first.

If good bail be not then put in, or if put in and excepted to they be not *perfected*, move the court for an attachment against him. So if he neglect to make any return of the writ, move for an attachment.

If

If sheriff go out of office, he must be ruled within *six* months afterwards to return the writ, otherwise he is not liable.

Practical Remarks.] *Of the origin and intent of ruling the sheriff.—Of the manner of ruling sheriff to return writ, and how the rule is to be served.—Of ruling sheriff to bring in the body, and what he must do in consequence thereof.—In what cases, and how, to move for an attachment against him, and of the nature and operation thereof.—In what cases the sheriff, or returning officer, shall be excused, and proceedings set aside.—Of proceeding against the coroner to return the attachment.—Of proceeding against sheriff, when out of office, to return the writ, and bring in the body.—When proceedings ought to be by attachment, and when by distringas.*

HAVING EXPLAINED THE MODE OF BRINGING DEFENDANT INTO COURT IN *BAILABLE* ACTIONS, AS WELL AS IN ACTIONS NOT *BAILABLE*, THE NEXT STEP TO BE TAKEN, IN EITHER CASE, IS TO SET FORTH PLAINTIFF'S CHARGE, OR CAUSE OF ACTION, AGAINST DEFENDANT, FULLY AND PARTICULARLY, IN THE

DECLARATION.

At what Time to Declare.

B. R.

Before the end of the next term after that in which process is returnable, or judgment of *non pros* may be signed.

C. B.

Same as in **B. R.** if called upon by rule; if not, plaintiff has till effoin day of third term.

It has been held of late, that if judgment of *non pros* be not signed, plaintiff may declare at any time *within the year*. Sed *Q.* Is not this contrary to the established rules of practice?

Plaintiff may obtain rules, from term to term, for further time to declare, *unless defendant be in custody*, or he move to make the rule *peremptory*.

How Declaration to be ingrossed and charged for.

Ingross declaration on treble 1d. stamp-paper; charge on back; copy 4d. *per fol.* (72 words); duty 3d.; for paper, nothing.

B. R.

Warrant to defend, 4d.; filing common bail according to statute, 7s. 2d.

C. B.

Warrant in debt, detinue, and trespass, 4d.; in other actions, 8d. Appearance according to statute, 5s. 10d.; if at suit of attorney, 7s. 2d.

Of Delivering or Filing Declarations.

There are three ways of delivering or filing declarations,

1. In Chief.

This is when plaintiff does not declare until after defendant has appeared, or plaintiff has appeared for him according to the statute.

If defendant has appeared, by putting in and perfecting special bail, or by filing common bail, or entering an appearance, as the case may be, plaintiff's attorney must deliver declaration to defendant's attorney, who is to pay for same according to the above charges; which if he refuse to do, or if his place of abode be unknown, declaration may be left in **J. B.** or prothonotary's office, and notice thereof in writing be given to defendant or his attorney; from the time of giving which notice, and not before, declaration is deemed well delivered.

If plaintiff has appeared for defendant according to statute, copy of declaration must be left in **J. B.** or prothonotary's office, and notice in writing given to defendant, or left for him at his last or usual place of abode; or, if not to be found, notice to be stuck up in the office. And from the time of giving or sticking up such notice, and not before, declaration is deemed well delivered.

2. De Bene Esse.

Delivering or filing declaration *de bene esse*, or conditionally, is when plaintiff declares before defendant has appeared, *i. e.* before he has put in and perfected special bail in bailable actions, or has filed common bail in **B. B.** or entered an appearance in **C. B.** in actions not bailable; and also before the time allowed for such his appearance has elapsed; for afterwards plaintiff cannot declare *de bene esse*.

When and how to declare De Bene Esse.

Upon all process returnable before the last return of any term, declaration may be delivered or filed at the return of such process *de bene esse*, or conditionally; but if delivered, it should be indorsed; or if filed, it should be inserted in the notice, that it is delivered or filed *de bene esse*, or conditionally, until bail put in, or perfected, and the like (as case may be).

3. By the Bye.

Declaring *by the bye*, is when defendant is already in court, either at suit of plaintiff or some other person, and declaration is delivered or filed without any fresh process being sued out against him.

B. B.

If defendant has himself appeared, either at plaintiff's or another's suit, any person may declare *by the bye* against him; but a stranger ought to do so in same term process is returnable. But if plaintiff

has

C. B.

Whether defendant has appeared himself, or plaintiff entered an appearance for him, no person can declare *by the bye* against him except plaintiff, who ought to do it same term writ is returnable.

has filed common bail for defendant, no person but plaintiff can declare against him *by the bye*, who may deliver as many declarations as he thinks fit any time before the end of the next term after return of process.

Of the Notice to Defendant to plead to Declaration.

Upon the declaration should be indorsed not only the charges thereof as above mentioned, but also the time within which defendant is to plead thereto. And in all cases where declarations are filed or left in the office, and notice thereof given to defendant, the time in which defendant is to plead thereto should be inserted in the notice.

Of the Time allowed for Pleading.

Where declarations are delivered or filed *in chief* as above mentioned, the time allowed is 4 days from the delivery thereof, if the venue be in *London* or *Middlesex*, and defendant lives within twenty miles of *London*; otherwise in 8 days, and this whether the action be bailable or not, provided that the declaration be delivered 4 days *exclusive* before the end of the term; otherwise notice must be for defendant to plead within the first 4 days of the next term.

But where declarations are delivered or filed *de bene esse*, the notice to plead in *B. B.* if the action be *not bailable*, is always 8 days; but if it be *bailable*, then 4 or 8, according to the above rule. This distinction, however, is not made in *C. B.* the notice *there* being always the same as first above mentioned.

Practical Remarks.] *The nature and intent of the declaration.—Of the different modes of declaring, viz. In Chief, De Bene Esse, By the Bye.—Of filing and delivering declarations.—Of the notice of declaration.—Its contents.—When to be given.—Of paying for declaration.—Of declaring against two defendants when one only has appeared.—Of declaring against one defendant when more are named in process.—Of declaration varying from process.—Of consolidating declarations, and striking out unnecessary counts.—How irregularities, on part of defendant, are cured by plaintiff's declaring; and, on part of plaintiff, by defendant's accepting declaration.—Of setting aside proceedings for irregularity in delivering declaration, or in serving notice thereof.—Of the rule for time to declare.*

OF THE VENUE.

In *real* and *mixed* actions, the venue should be the county or place where the cause of action actually arose; but in *personal* actions plaintiff is at liberty to declare in what county he pleases. Defendant however may, by motion, change the venue to another county, on the ground of the cause of action having arisen there, unless plaintiff undertake to give evidence of some matter in issue arising in the county wherein the action is laid.

Practical Remarks.] *Of the origin and intent of the venue in declarations.—Of laying the venue.—Of changing the venue.—Of bringing back or altering the venue after it has been changed.—Of laying and changing the venue by privileged persons.—Of plaintiff in the action altering or changing venue.*

OF CLAIMING CONUSANCE.

Particular franchises have sometimes the privilege of holding pleas within their jurisdiction; if therefore actions be brought in either of the courts at Westminster, and such franchises would have the cause determined before them, they must demand conusance thereof. But great precision is required both as to the time and manner of claiming conusance.

Practical Remarks.] *Of the nature of inferior jurisdictions.—Who can demand conusance.—In what cases granted or refused.—Of the time and manner of claiming it.*

OF OYER.

If the action be on a specialty, or any bond or deed be pleaded, the other party may demand oyer of same, which is granted by a copy of the instrument being given in writing.

Oyer must be granted in two days, exclusive of the day of demand.

Practical Remarks.] *Of what and in what cases oyer may be demanded.—Of the time and manner of demanding and granting oyer.—Of not demanding oyer in time, and of refusing or neglecting to grant it after demand made.—To what the party is entitled upon oyer, and of setting out the same in the pleadings.—Of the necessity and advantage of demanding oyer.*

OF IMPARLANCES.

When defendant need not plead within the usual limited time, but has till the four first days of the next term after declaration delivered to plead in, that is called being entitled to an imparlance.

If writ be returnable before the last return of any term, and declaration not delivered or filed, and notice thereof given *four days exclusive* before the end of such term, defendant is entitled to an imparlance.

So if writ be returnable on the last return day of term.

Or if writ be returnable one term, and plaintiff does not declare before the effoin-day of the next term.

Practical Remarks.] *Of the meaning and intent of an imparlance.—The kinds of imparlances, viz. general, special, and general special.—How and when to apply for an imparlance.—When granted or refused.—Of entering imparlances.*

OF PLEADING IN ABATEMENT.

Pleas in abatement are merely dilatory; a temporary check, not a complete bar, to plaintiff's action.

They must be pleaded within the four or eight days allowed for pleading, if declaration delivered or filed before the last four days in term,

term, otherwise within four days of the next term, and cannot be delivered afterwards, although judgment be not signed.

The days are both *inclusive*.

To be pleaded whether rule to plead be given or not.

Must be signed by counsel, and have an affidavit of truth thereof annexed.

Practical Remarks.] *Of the nature of pleas in abatement, and their kinds.—Of the time and manner of pleading in abatement.—Of the affidavit required to be annexed thereto.—Of judgment thereon, and of entering nil capiat per breve.*

OF PAYING MONEY INTO COURT.

If the dispute between the parties be only about the *quantum* of the debt due, and defendant acknowledge *some* money is owing, he ought to pay that sum into court, which should be done at this stage of the suit before plea pleaded.

How to pay Money into Court.

B. B.

Give brief to counsel for that purpose, who will sign same: fee 10s. 6d. Carry it to signer of writs, and pay the money to be brought into court to him; take a receipt for same; pay 2s. 4d.; carry brief and receipt to clerk of rules, who will draw up rule; pay 7s.; serve copy on plaintiff's attorney, with appointment for master to tax costs and deliver your plea.

C. B.

If sum do not exceed 5l. get treasury rule of secondary for that purpose; pay 6s.; carry it to the prothonotary, who will receive the money, and write a receipt in margin. Pay 1d. in the pound, 1s. 4d. for receipt, and 2s. for entering plea.

If sum be more than 5l. give brief to serjeant, who will sign it. Carry it to secondary, and proceed as above.

Practical Remarks.] *The origin and intent of paying money into court.—Of the manner and time of paying same.—In what actions and cases it may be paid.—Of the consequences to defendant and to plaintiff of paying money into court.—Of bringing a further sum into court.—Of defendant's refusing to pay the costs, and how plaintiff in such case is to proceed.*

OF PLEADING IN BAR.

Pleas in bar are pleas to the merits, by way of bar to the action itself, and not merely in abatement of the writ or count.

When to plead.

Defendant must plead in four or eight days, according to the time indorsed on the declaration or inserted in the notice, for which see ante p. 19.

In **B. B.** the four or eight days are always reckoned, one inclusive, the other exclusive. In **C. B.** both inclusive.

*What to plead, and how.*1. *Of the General Issue.***B. B.**

Ingross it on treble 1d. stamp-paper, and deliver it to plaintiff's attorney or agent, or enter it in general-issue book with clerk of judgments. Pay 6d.

C. B.

Ingross it on treble 1d. stamp-paper, and deliver it to plaintiff's attorney; or, if not to be found, or he refuse it, file it with prothonotary. Pay 2s.

2. *Of Special Pleas.*

They must be ingrossed on treble 1d. stamp-paper, and

B. B.

Filed with the clerk of the papers.

C. B.

Either be delivered to plaintiff's attorney (which is the usual way), or filed with prothonotary: and plaintiff's attorney must then take same out of office.

Must have a counsel or serjeant's signature.

Except the following, which are tantamount to the general issue, *compert ad diem, son assault demesne, plene administravit, riens per descendent, ne unques executor or administrator, nul tiel record, per minas, per dures, infancy, solvit ad diem, non est factum, nil debet, non assumpsit*: but *non assumpsit infra sex annos* ought to be signed.

3. *Of Double Pleas.*

To enable defendant to plead several matters, he must first obtain a rule for that purpose, and serve copy thereof on plaintiff's attorney, as they can only be pleaded by leave of the court; to procure which

B. B.

Give brief to counsel, naming your pleas. Fee 10s. 6d. Carry it to clerk of rules with plea, and he will draw up rule.

C. B.

In some cases it is only necessary to give brief to serjeant, naming pleas, and then draw up rule with secondary. But there are variety of double pleas not allowed in this court on first motion; but, upon being moved therein, a rule *nisi* is only granted; and serjeant must, at another time, move to make rule *absolute*. Fee for first motion 10s. 6d.; for second, one guinea.

Practical Remarks.] *Of the manner and time of pleading double.—Of the origin of pleading double, and herein of the statute of 4 Anne.—In what actions double pleas allowed.—What double pleas are allowed, and herein of incompatible pleas.—Of the judge's certificate in case any of the pleas are found against defendant.*

Were

Were it not for exceeding the limits of the present undertaking, it might be useful in this place to treat of the several pleas of *tender, set off, statute of limitations, bankruptcy, &c.* with practical remarks on the time, manner, and cases, in which they ought to be pleaded.

OF THE RULE TO PLEAD.

When defendant neglects or refuses to plead in due time, plaintiff, in order to compel him so to do, or to intitle himself to judgment in case of his default, must first give *a rule to plead.*

Make out rule on a piece of common unstamped paper, carry it

B. B.

C. B.

To clerk of rules, who will enter it in his book. Pay 1s. 10d. To secondary, who will enter it in his book. Pay 1s. 10d.

Rule expires in four days, inclusive of the day it is given; Sunday reckoned, unless the last day.

It may be given any time in term, or within four days after.

Judgment may be signed immediately after expiration thereof.

If four terms are elapsed since declaration, a term's notice to plead necessary.

Practical Remarks.] *In what cases rule to plead not necessary.—When it ought to be served.—Of judgment for want of plea at expiration thereof.*

OF DEMANDING A PLEA.

Plaintiff must also make a demand of plea, by note in writing; and this in all cases where defendant has himself appeared, but not where declaration was filed *de bene esse*, and plaintiff has appeared for him according to the statute.

Practical Remarks.] *When demand to be made.—Of an irregular demand.—How far demand of plea is waiver of bail.*

N. B. In order to gain time and hasten defendant, plaintiff may both give the rule to plead and make demand of plea immediately upon delivery of declaration, and before the time for pleading is expired.

OF SEARCHING FOR PLEA.

After rule given, and demand made, if no plea be delivered, search for plea,

B. B.

C. B.

With clerk of judgments at **B.** office, who keeps the general issue book; or, if none there, with clerk of papers, where special pleas are filed; and if no plea be found, sign judgment.

At prothonotary's office; and if no plea found, sign judgment.—

How to sign judgment in such case, in both courts, vid. post. tit. Judgment by Default.

OF PROCURING TIME TO PLEAD.

If defendant want time to plead, take out judge's summons for that purpose, serve plaintiff's attorney with copy, attend thereon; the usual terms on which time is granted are, pleading *issuably*, rejoining *gratis*, and taking short notice of trial.

Practical Remarks.] *In what cases time to plead will be granted.—At what time summons should be taken out.—Of the effect of summons as to staying proceedings.—Of the terms on which time is granted.—What are issuable pleas agreeable thereto.—Of the consequences of defendant's not pleading a proper plea according to order.—Of signing judgment at the expiration thereof.*

OF MOVING TO ABIDE BY PLEA.

If defendant plead a *sham* plea in order to cause delay, move the court in term, and in vacation take out judge's summons for defendant to shew cause why he should not abide by plea pleaded, or plead another that he will abide by.

If he abide by it, costs of motion or summons not allowed.

After this rule, defendant can only plead *general issue*, or with notice of *set-off*.

If no new plea pleaded, proceed to replication, or making up paper book, or issue, as in other cases.

OF REPLYING, REJOINING, &c.

There is no fixed time for replying, &c. but if you wish to compel the other party to proceed,

B. B.

Get a four-day rule from master (had *gratis*), enter it with clerk of rules, pay 1s. 10d. serve copy on plaintiff's attorney; and if plaintiff do not reply within the time, sign judgment.

It is said, that no demand of replication is necessary in this court; but it is always made by fair practitioners.

If no proceedings for four terms, a term's notice necessary.

The rule to reply, &c. may be given any time in term, or within sixteen days after.

Proceed in the same way *mutatis mutandis* to urge defendant to *rejoin*, plaintiff to *sur-rejoin*, and so on until issue joined, and paper book, or issue delivered.

C. B.

Give rule to secondary, pay 1s. 10d. Demand replication in writing. Search for it at expiration of rule at prothonotary's. If none there, sign judgment.

For signing judgment in such case, in both courts, vid. post. tit. Judgment of Non Pros.

OF THE ISSUE, AND PAPER-BOOK.

The pleadings being finished by the parties coming to issue thereon, plaintiff should proceed to make up and deliver the issue, or paper-book.

B. B.

Where the pleadings are only the *general issue*, or such pleas as are tantamount thereto, plaintiff's attorney may himself make up issue on treble 1 d. stamp paper, and charge 4 d. *per sheet* for copy, besides stamps; entering plea 1 s. Deliver issue to defendant's attorney, who is to pay for same accordingly, or judgment to be signed twenty-four hours after.

Upon back of issue you may give notice of trial.

But in all cases of *special pleadings*, the clerk of the papers must make out issue (and it is then called the *paper-book*), with rule in margin for defendant to receive and return it within four days exclusive (pay 8 d. *per folio* for the whole, and 4 d. for pleadings from the declaration). Deliver it to defendant's attorney, with notice of trial on back. If not returned according to rule, sign judgment; if returned in time, and paid for (*i. e.*) 8 d. *per folio* for pleadings on defendant's part (such as *plea, rejoinder, &c.*), and 4 d. for plaintiff's entries (*as replication, &c.*), proceed to trial.

N. B. If declaration delivered and not yet paid for, you may on the issue charge for same and for warrant, thus, *For declaration unpaid, so much.*

Practical Remarks.] *Of making up issue by bill,—by original.—Of the memorandum in the issue, when general or special.—Of delivering and returning issue.—Of paying for same.—Of pleading or demurring after issue joined.—Of an imperfect issue.—Of issue varying from the pleadings.—Of withdrawing and amending issue.—Of entering continuances on the issue roll.*

C. B.

In all cases plaintiff's attorney makes up the issue himself, and deliver to defendant's attorney copy thereof on treble 1 d. stamp paper. Charge on back, copy 4 d. *per folio*, and duty. For entry of plea, if *general issue*, 2 s. if *special*, 8 d. *per folio*. If appearance entered according to statute, charge it on back. Defendant's attorney must pay for same, or sign judgment.

Upon the back of the issue give notice of trial.

OF STRIKING OUT SPECIAL PLEAS, &c.

When issue or paper-book is delivered to defendant, he may, unless he has been moved to abide by plea, as ante p. 24. strike out the special pleas, and plead the general issue, or strike out the *similiter*, and leave a demurrer in the office to plaintiff's replication; in which latter case,
demurrer

demurrer and joinder are entered in paper-book, then called *demurrer-book*, which is delivered again to defendant's attorney, who must return same within *twenty-four hours*, or judgment.

But the same notice of trial, as given on back of issue or paper-book, shall serve for such general issue; or for execution of writ of inquiry, if judgment on demurrer be not final.

NOTICE OF TRIAL.

When to be given.

In **B. B.** plaintiff is not bound to give notice of trial till the term succeeding that in which issue was joined; but in **C. B.** it must be given the same term.

What Notice good.

1. *In town causes.*

B. B.

C. B.

If venue be in London or Middlesex, and defendant live within forty miles of London, eight days, exclusive of the day it is given; if above forty miles, fourteen days.

2. *In country causes.*

Ten days at least, in both courts.

3. *On an Old Issue.*

Where no proceedings have been had for four terms exclusive, a whole term's notice of trial is to be given.

A judge's summons, if no order made, is no proceeding, but a notice of trial, though countermanded, is.

A term's notice not necessary, if defendant has delayed the cause by injunction.

Of New Notice.

If plaintiff give notice of trial, and then does not proceed, he cannot afterwards go to trial without new notice, unless by consent, or rule of court.

Of continuing Notice.

In London and Middlesex, if notice be given for one sitting, plaintiff may continue it, by giving notice that he will try it at a subsequent sitting.

Two days notice of continuance in **B. B.** *one* in **C. B.** and that may be the day *preceding* the trial. But, *Q.* as the hardship is obvious.

It can only be continued once in a term.

Of Countermanding Notice.

Must be delivered in writing at least six days before trial in all country causes; and also in town causes, if defendant live above forty miles

miles from London; but if within forty miles, then two days, exclusive of the day it is given.

Practical Remarks.] *At what time notice of trial should be given.—In what manner.—To whom and where.—Of continuing and countermanding same.—Consequences of neither countermanding notice, nor proceeding to trial.*

OF PUTTING OFF TRIAL.

If defendant wish to put off trial on account of the absence of a material witness, or the like, he must move the court upon an affidavit of the fact, who will, according to the merits of the case, grant or refuse such rule.

Practical Remarks.] *Of the affidavit whereon to ground such application.—When such application to be made.—In what cases, and for what time court will put off trial.*

OF TRIAL BY SPECIAL JURY.

In particular cases, it may be prudent for plaintiff or defendant to have the cause tried by a special jury, which must be done by motion, and the jury struck before the master in **B. B.** or prothonotary in **C. B.**

Practical Remarks.] *Of the allowance thereof, by 3 G. II. c. 25.—Of the motion for special jury.—Of the method of striking special jury.—Of the costs incurred thereby, and who is to defray same, according to 24 G. II. c. 18.*

OF GRANTING A VIEW.

The special jury being struck, it is sometimes thought necessary for them to take a view of the premises concerning which the matter in dispute arises, that they may be acquainted with the situation thereof, and better understand the evidence given upon the trial.

Rule for a view is obtained in term from clerk of rules, by counsel signing brief for that purpose; and in vacation, by judge's order on producing counsel's signature.

Practical Remarks.] *In what cases a view will be granted, and herein of the stat. 4 and 5 Ann. c. 16.—How many jurors must be present at the view, and herein of 3 G. II. c. 25. § 14.—How to obtain rule for a view.—Of the form of the rule.*

OF EXAMINING WITNESSES ON INTERROGATORIES.

If any material witnesses be going abroad, and not likely to return before the trial, or if resident abroad; court, on motion grounded on proper affidavit, will grant leave to examine them upon interrogatories, the other party being at liberty to cross-examine them in the same way.

Practical Remarks.] *In what cases allowed.—Must be by motion for a rule for that purpose.—Interrogatories to be signed by counsel, or serjeant.—Of the cross-examination by the other party.*

Of

OF TRIAL AT BAR.

Trial at bar, is a trial of an issue joined between the parties before the judges of the court in term time by a special jury, granted only on particular intricate cases, and cannot be had without motion in court, which must be made after issue joined.

OF MAKING UP RECORD FOR TRIAL, AND PASSING SAME.

The nisi prius record should contain the whole of the pleadings, award of *venire*, *distingas*, &c. and be engrossed on a double 2s. 6d. stamp parchment. Before the record can be passed, the *issue*, or an *incipitur* thereof, must be properly entered on the roll. If therefore it be not already entered, by plaintiff having been ruled to enter issue as vide post; get a roll, which in **B. R.** may be had of stationer, or at **A. B.** office, pay 6d.; but in **C. B.** can only be got at prothonotary's, where it is given you ready marked and numbered. Having prepared record, carry issue roll, record, and draft of issue, or paper-book,

B. R.

To the clerk of judgments, who enters issue, and marks the issue roll, record, and draft of issue or paper-book; pay him for entering issue 3s. 6d. if not more than ten sheets, and 1s. for every six more. Then carry record to clerk of nisi prius office, who will *pass* same, by putting a mark thereon, and sealing it up; pay 7s. 6d. for first eight sheets, and 7s. for every eight more; sealer 6d.: if above three weeks from end of term, 2s. for judge's warrant; if on an old issue, 2s. more. And in such case, if the entries have not been made and paid for, get a number roll at the same office of the term issue is joined, make out a docquet for entry, and docquet same.—Record should be sealed within three weeks after the issuable terms.

But by a judge's order, for which you pay 2s. it may be sealed at any time before assizes.

The record thus passed, take it away with you, and carry same to marshal at the time of entering your cause for trial.

Practical Remarks.] *How to make up the record.—Of the memorandum and the meaning thereof.—Of entering the placita, and the meaning thereof.—The difference between the records in the two courts in this respect, and the reason thereof.—Of the record varying from the issue delivered.*

C. B.

To prothonotary's office, who signs record, pay 1s. for entering issue, 2s. a count, or if special, 8d. per folio; then file warrants of attorney with clerk of the warrants, who will mark the record; carry same to chief justice's chambers, whose clerk will examine jurata, and seal the record; pay at sittings 1s. at assizes 6d.; pay him likewise as clerk of the treasury for first three sheets 2s. and for every other sheet 4d. and 2s. 2d. for the seal.

If three weeks after term, 2s. for judge's warrant.

OF THE VENIRE FACIAS.

The record being made up and passed, plaintiff next proceeds to award the jury process, by suing out the *venire* and *distringas*, or *hab. corp. juratorum*.

Get a blank *venire* of stationer, fill it up, 2s. 7d. each.

B. B.

C. B.

Not to be signed.

Signed by prothonotary, 1s. 4d.

Sealed 7d. and returned by sheriff 2s. 6d.

If cause to be tried in London or Middlesex, *venire* to be *tested* the first return of term in which cause is to be tried, and made returnable some return-day before trial. If at *assizes*, it should be *tested* the first return-day of the term preceding the *assizes*, and *returnable* the last day of that term.

In *country* causes, *venire* is returned by the under-sheriff in town; and in **C. B.** pannel must be annexed thereto, otherwise clerk of *hab. corpora* will not sign *hab. corp.*; but in *town* causes, it is not returned, though taken out and sealed, in order that plaintiff's attorney may be allowed for same in costs.

Practical Remarks.] *Of the nature and intent of the venire.—How the venire was formerly awarded de vicineto.—How now awarded from the body of the county, and herein of the stat. 4 and 5 Ann.—In what cases the old practice is adhered to, as in actions on penal statutes.—Of special suggestions for awarding the venire, as when the issue is in a county palatine.—When a Welch issue.—When a sheriff is interested, or of kin to defendant.—Of awarding venires tam quam.*

OF THE DISTRINGAS, AND HAB. CORP. JURATORUM.

At the same time of issuing *venire*, sue out *distringas* in **B. B.** and *hab. cor. jur.* in **C. B.** which writs are grounded upon a supposed default of the jurors in not coming upon the *venire*.

B. B.

C. B.

Get *distringas* at stationer's, pay 2s. 7d. not signed; sealing 7d.

Get *hab. corp. jur.* of stationer, 2s. 7d. get it sealed, pay 7d. signing by clerk of *habeas corpora* in town 2s.; at *assizes*, 1s. 9d.

Distringas and *hab. corp. jur.* in *town* causes should be *tested* the return-day of the *venire*, and *returnable* next return-day after trial.

In *country* causes, *tested* on return of *venire*, and *returnable* the first return of the next term after the *assizes*.

In London, carry *distringas* or *hab. cor. jur.* to one of the compters, pay sheriff for returning it 4s. 6d. In Middlesex, carry it to sheriff's office, pay for returning 12s. annex it to the record with the pannel.—In *country* causes, they are returned by the under-sheriff in the country.

Practical Remarks.] *Of the meaning and effect of the distringas and hab. cor. jur.—Of the return thereof.—In what cases they are amendable.*

OF ENTERING CAUSE FOR TRIAL.

1. *When to be entered.*

B. B.

Causes in London or Middlesex, if for sittings in term, must be entered *two days exclusive* before the day on which they are to be tried, or defendant may enter a *ne recipiatur*.

If for the sittings after term, must be entered before the adjournment-day in London or Middlesex, or marshal may refuse to receive same.

If however a *ne recipiatur* be not entered, strictness is not observed, and cause may be set down the evening before the sittings.

C. B.

In London or Middlesex, causes for sittings in or after term may be entered, and the records and writs brought in any time before the day of sittings.

2. *How to be entered.*

In *town* causes, to be entered in marshal's book at Lord Kenyon's chambers, pay 11 s. 8 d. at which time leave record, with distringas and pannel annexed, with marshal.

In *country* causes, the writs and records to be entered together with the marshal, pay 12 s. to be delivered to him the day after commission is opened before the court sits, except in Norfolk and York, and then not till second day after commission-day.

Causes are for the most part tried in the order in which they stand on judges paper, beginning with remanets, if any.

In *town* causes, to be entered in marshal's book at Lord Loughborough's chambers, pay 13 s. 9 d. at which time leave record with hab. cor. jur. and pannel annexed.

OF SUBPŒNAING WITNESSES.

To compel witnesses to appear at the trial, get a blank *subpœna* from stationer, pay 2 s. 7 d. fill it up.

It may be tested any day in term before trial and service; in country causes, it is generally tested last day of term.

B. B.

Make a note or precipe for the office signed by signer of writs, pay 1 s. 8 d.; sealing 7 d.

C. B.

Signed by prothonotary 1 s.; sealing, 7 d. No note or precipe necessary.

If there be any deeds or papers, &c. in witnesses custody to be produced, make out *subpœna duces tecum* in same manner as common *subpœna*; and if the party himself, plaintiff or defendant, have any papers or books in his custody, the usual way is to serve a notice on the attorney for him to produce them; which notice, though not compulsory, may be given in evidence upon trial, and the jury may draw their own inference from parties non-compliance therewith.

If the witness be in *custody*, prepare *habeas corpus ad testificandum* on 5 s. stamp, make affidavit that he is a material witness, get judge's fiat thereon; serve marshal or gaoler, in whose custody witness is, with the same, that he may make a return thereto, tendering him reasonable charges for bringing his prisoner up, who will be brought into court by tipstaff.

No more than four witnesses may be put in one *subpœna*.

Each witness must be served with a copy of *subpœna* (which may be had of stationer), and at time of service pay him, if in London, 1 s.; if in country, tender him his reasonable expences.

Practical Remarks.] *Of the nature of the subpœna.—Of the affidavit on applying for hab. corp. ad testificandum.—Of the judge's fiat thereon.—Of the service of subpœna.—How long it should be served before trial.—What expences should be tendered.—Of plaintiff's remedy in case of non-attendance of witnesses by attachment and action on statute.*

OF TRIAL.

When the cause is entered and in the paper, the attornies are allowed for their attendance till it be tried, so that no excuse will be taken by the court for their absence at the time the cause is called on. If therefore plaintiff's attorney be not there ready, cause may be struck out of the paper by order of court, and he be subjected to costs of the day, or his client be non-suited; and if defendant's attorney be absent, his client may lose the benefit of his case in defence, and sustain costs.

Of Nonsuiting at the Trial.

After the trial, but before the jury have given their verdict, plaintiff, if he think proper, may absent himself from the court, and suffer a nonsuit; which is not unfrequently done to prevent a verdict being given against him, since after a judgment of nonsuit, plaintiff may bring another action for the same cause, which he cannot do after a verdict upon the merits.

Fees of nonsuit are about 2 l. 1 s.

Practical Remarks.] *Of the different causes of nonsuit.—Of the nature and effect of nonsuit.—Of setting aside nonsuits.*

Of the Verdict.

If the jury give their verdict, the judge's associate takes down same, and indorses it on the record, together with the damages assessed.

Fees to be paid by the party who obtains the verdict in a *town* cause about 2 l. 18 s. 8 d.; in *country* causes somewhat more.

Of referring the Cause to Arbitration.

In many cases, especially of long and intricate accounts between the parties, the cause, upon trial, is referred to arbitration.

Get order of reference from associate; and if you have any witnesses to be examined before the arbitrator, bring them to the bar of the court, give

give their names in writing to crier, who will swear them; pay 2s. for each so sworn. If this be not done, they must be sworn before a judge, which is more troublesome and expensive. Plaintiff's attorney then gets an appointment from arbitrator of the time and place to sit on the reference; with a copy of which, and of the order of reference, he should serve defendant's attorney. They attend accordingly. Arbitrator takes minutes of the evidence, and the whole being gone through, he fixes some future time for giving his award in writing to the parties. *With respect to the conduct of the arbitrator, the doctrine of awards, and the mode of enforcing them, see post, tit. Arbitration.*

Of Judges Certificates.

After verdict, and whilst the court is sitting, it is sometimes necessary to make an application to the judge for his certificate to entitle the party to particular costs agreeable to certain statutes, as, in some actions of trespass where damages are given under 40s. So for the costs of a special jury, and the like. It is useful therefore to consider in what cases such application should be made, lest the party, by omission or inadvertence, be deprived of the benefits to be reaped therefrom.

Of Suggestions for Costs.

If upon trial plaintiff's cause of action, though he obtain a verdict, prove to be under 40s. defendant in some cases is entitled to costs by entering a suggestion on the roll, a rule for which purpose should be applied for, upon affidavit to the court, the next term after verdict.

There are also other incidents attending the trial well worthy of observation, such as *demurrers to evidence, bills of exception, &c.*

OF THE POSTEA.

1. In town causes.

B. B.

After trial at the sittings in London or Middlesex, the associate will immediately deliver the record, with the distringas and pannel annexed, to the party for whom verdict has been given, and you indorse the postea yourself on back of the record.

C. B.

The associate indorses the postea. If cause tried in *term*, he will deliver same about fifth day after trial; if tried in *vacation*, about the first week in subsequent term, for which, if only one issue, he is paid at trial; but if more, pay 2s. per issue on returning postea.

2. In country causes.

After trial at assizes, the associate keeps the record till next term, and in the interim indorses postea, for which he is paid at the trial.

Practical Remarks.] *Of entering the verdict on postea.—Of amending the verdict and postea.—Of the different kinds of verdicts.—Of void verdicts, and what shall make them so.—Of setting aside the verdict.—Of awarding a venire facias de novo.*

OF RULE FOR JUDGMENT.

B. B.

On the return-day of *distringas*, give a rule for judgment on the *postea*; pay 1 s. 10 d. It is given in same manner as rule to plead, and is a *four-day rule exclusive* (Sundays not reckoned), in which time defendant may move for a new trial, or in arrest of judgment.

No need for such rule after non-suit.

Proceed afterwards to tax costs, &c. as post, tit. Signing final Judgment.

C. B.

No rule for judgment need be given, but wait the *four days exclusive* after return of *hab. cor. jur.* which time defendant has to move for a new trial, or in arrest of judgment.

OF THE RULE TO ENTER ISSUE.

If plaintiff neglect to proceed after the delivery of issue or paper-book, and defendant would wish to go on to trial, let him get a four-day rule of master in **B. B.** or secondary in **C. B.** for plaintiff to *enter the issue*, serve copy thereof on plaintiff's attorney, who must immediately not merely make an *incipitur* of the issue on the roll (as ante p. 28), but must enter the *whole of the issue* completely thereon; get it marked by clerk of judgments, docquet the entry thereof in **B. B.** office, and carry it to clerk of treasury to be filed there; which if not done by plaintiff within the time allowed by rule, defendant may sign judgment of *non pros* (vid. post, tit. Non Pros); but if done, and plaintiff still refuse to proceed to trial, defendant may then move for judgment, *as in case of a nonsuit* (vid. post, tit. Judgment as in case of Nonsuit).

Plaintiff may by summons obtain further time to enter issue.

Practical Remarks.] *Of the nature and effect of this rule, and of the time of ruling plaintiff to enter issue.*

OF CARRYING IN ROLLS, AND DOCQUETTING ENTRIES.

It may be observed, that when plaintiff is *ruled to enter issue*, he must *immediately* complete and carry in the roll to be filed as last above-mentioned; whereas, when he is not ruled so to do, he only in the first instance makes an *incipitur* of the issue on the roll, and gets the same marked at the time of passing *nisi prius record* (as ante, p. 28). But he must in the *latter* case, as well as in the *former*, afterwards *complete* the rolls, carry in the same to be filed in treasury, and docquet entries thereof. Issue rolls should be filed and docquetted *as of* the term in which issue was joined, so that plaintiff's attorney must carry in the same, and docquet his entries some time before the next term after that in which issue was joined, or he will have to pay an extra fee, called *post terminum*.

D

How

*How to carry in Rolls, and docquet Entries.***B. B.**

Get as many numbers from **B. B.** office as you have rolls of that term to carry in; complete the issues on the rolls respectively, and number same; enter in your book the respective numbers of your rolls, name of the parties, and the nature of the issues; make a copy of the docquet of your entries when you carry your rolls in, on a common piece of paper, called the docquet paper, and containing an entry of *all* your issue and * judgment rolls, to be filed as of that term; take docquet paper and rolls to **B. B.** office at the time above mentioned, file the former with clerk of judgments, who will, if the entries are all paid for, mark your rolls; pay 3s. then give all your rolls to a clerk of treasury who attends in **B. B.** office a day or two before the term to receive the same, to be filed in treasury; he will pay you 4d. for each roll.

C. B.

The rolls in **C. B.** as mentioned (ante, p. 28), are given to the attorney ready marked and numbered, so no occasion to get numbers as in **B. B.**; carry your book of entries to prothonotary's office, and enter same in the common docquet book there; after which, give your rolls to a clerk of treasury to be filed, who attends at the office just before the term to receive same.

The use of the docquetting the entries of issues and judgments is, in order to find the issue or judgment rolls when filed in treasury with greater ease in case they should hereafter be wanted.

Practical Remarks.] *Of the nature of the issue roll.—The intent of entering and filing same.—The necessity of docquetting judgments in certain cases, and the advantages to be derived therefrom.—Of the time of entering and docquetting same.—Of post terminum rolls.—Of new rolls where the old one has been lost.—Of registering judgments, and of the memorial for that purpose.*

HITHERTO THE PROCESS HATH BEEN TREATED OF IN CASES WHERE THE PARTIES GO TO TRIAL UPON AN ISSUE TO BE TRIED BY A *JURY*; BUT IT FREQUENTLY HAPPENS, THAT THE POINT IN DISPUTE IS OF A NATURE NOT CAPABLE OF BEING DETERMINED BY SUCH TRIAL, OR THAT *DEFENDANT* IS UNWILLING TO STAND THE TEST OF A TRIAL, OR THAT HE NEGLECTS TO DEFEND THE SUIT, OR THAT *PLAINTIFF* OMITTS TO PROSECUTE HIS CLAIM. IT IS NECESSARY THEREFORE TO CONSIDER IN WHAT MANNER TO PROCEED IN EACH OF THESE

* *N. B.* The same practice prevails of entering on the rolls, carrying in, filing, and docquetting entries of all judgments by *default*, *confession*, &c. which ought to be entered as of the term in which they were signed.

CASES,

CASES, WHICH INCLUDE PROCEEDINGS ON DEMURRER; TRIAL BY RECORD; JUDGMENT AGAINST DEFENDANT, BY DEFAULT, ON CONFESSION, ON WARRANT OF ATTORNEY; JUDGMENT AGAINST PLAINTIFF, OF NON PROS, AND AS IN CASE OF A NONSUIT.—OF EACH IN THEIR ORDER.

OF PROCEEDINGS ON DEMURRER.

When the pleadings are defective in point of law, either in matter of substance, or of form, they may be demurred to, generally or specially; and if the other party join in demurrer, the question in dispute is argued before the judges in term-time for their decision thereon.

B. 13.

On a *general* demurrer to declaration, plaintiff's attorney adds a joinder thereto, and makes up and delivers issue thereon, for which must be paid 4d. per sheet besides stamps, or judgment may be signed.

But if it be a *special* demurrer, or a general one after a *special plea*, file it with clerk of papers, who makes up demurrer book, and gives a four-day rule in margin for defendant to receive and return same, which he should do accordingly, and pay for entries (same as on paper-book, ante, p. 25), or judgment may be signed.

Afterwards get roll (as ante, p. 28); make an *incipitur* thereon, and carry same, together with demurrer-book, to be marked by clerk of judgments (who if it be a demurrer to part, and issue to part, will also enter your issue).

But *before* argument, complete your demurrer roll, and file it with clerk of treasury, as it will be wanted in court.

This being done, move by counsel for a *concilium*, or day to argue demurrer, then draw up rule with clerk of rules, pay 4s. and apply to clerk of papers to set down same for argument; pay 1s.

Copies of demurrer-book to be given to judges *two* days before argument. To the chief justice and senior judge, by *plaintiff*; to the other two, by *defendant*. If defendant neglect so to do, let plaintiff do it for him, and defendant is thereby precluded from being heard on argument.

C. 15.

In *all* cases plaintiff's attorney makes up demurrer-book, and delivers it on treble 1d. stamp paper to defendant's attorney, who must pay for it 4d. per sheet, besides stamps, and also for the entries of his pleadings, otherwise judgment may be signed.

Plaintiff's attorney then enters the whole proceedings on roll; and having delivered same to secondary, gets serjeant to move for a *concilium*; secondary draws up rule for that purpose, which must be served on defendant's attorney, and the demurrer is put down for argument.

ment. Plaintiff therefore, in such case, has only to give brief to counsel or serjeant to move for judgment.

Of Judgment on Demurrer.

If judgment be for plaintiff, get rule for judgment with clerk of rules in **B. R.** or secondary in **C. B.** If *interlocutory*, give notice of inquiry; which notice may be given (conditionally) on the back of the joinder in demurrer. If *final*, stamp either rule for judgment or demurrer-book with double 2s. 6d. stamp; and in **B. R.** get clerk of treasury to attend master with roll, who will sign final judgment, by marking the costs thereon. In **C. B.** carry same to prothonotary, who will tax costs, and mark the same on rule for judgment, after which proceed to execution.

Practical Remarks.] *The nature of a demurrer.—General and special.—Of general and special demurrers at common law.—Of the alteration therein by different statutes.—Of the construction of these statutes.—In what cases general or special demurrer now necessary.—Of amending pleadings after demurrer.—Of withdrawing demurrer.—Of making up, delivering, and paying for demurrer-book.—In what cases defendant may make up demurrer-book.—Of compelling the party to join in demurrer.—Of the mode of proceeding where there is a demurrer to part, and issue to part.—Of the concilium.—Of judgment on demurrer, and the entry thereof.*

OF TRIAL BY RECORD.

Where a matter of record is either declared upon, or pleaded, as in an action of debt on judgment, or plea of judgment recovered, the other party may plead or reply *nul tiel record*; upon this issue is joined, the roll is made up, and entries paid for and docketted, as in other cases; the trial of which issue is to be determined by the producing of the record into court, and inspecting the same. If the party fail in producing the record, or if when produced it be adjudged not the same record as the one pleaded, judgment of *failure of record* will be against him, and *vice versa*.

Where the action sounds in damages, plaintiff may upon the issue of *nul tiel record*, as upon joinder in demurrer, give notice of executing inquiry in case judgment be for him.

Practical Remarks.] *The nature of trial by record, and what may be tried thereby.—Of pleading a former recovery.—Auter action pendent.—Outlawry.—Privilege.—Of pleading nul tiel record to bail-bonds and recognizances.—To statutes pleaded.—When nul tiel record cannot be pleaded.—What is to be done on pleading matters of record.—Of the form and conclusion of nul tiel record.—Of amending after it has been pleaded.—Of making up the issue.—Of producing the record.—Of failure therein.—Of the judgment and entry.*

OF JUDGMENT BY DEFAULT.

If defendant neglect to plead or rejoin within due time, or in any other respect be guilty of a default of procedure on his part, plaintiff may

may sign judgment against him by reason of such default, which judgment is either interlocutory or final.

How to sign Judgment by Default.

B. B.

Make an *incipitur* of the declaration on a treble 1d. stamp, if judgment be *interlocutory*; or on a double 2s. 6d. stamp if *final*. Enter also *incipitur* on a roll, carry judgment-paper and roll to clerk of judgment, who will sign the same; pay 4d. per sheet, and 8d. filing warrants of attorney. If it be *final*, get the master to tax costs, who will mark same on judgment-paper, then sue out execution.

C. B.

Make an *incipitur* of declaration as in **B. B.** and *incipitur* on roll; make out warrants of attorney; file them with clerk of the warrants (pay in debt, trespass, and detinue 4d. in other actions 8d. each), he marks judgment-paper; the roll in this court is already marked (vid. p. 28); carry it, with draft of declaration, to prothonotary, who signs judgment; if *final*, get him to tax costs, and proceed to execution; pay 2s. if declaration be same term, and 3s. for judgment by confession and warrant of attorney.

If judgment be only *interlocutory*, proceed to

Writ of Inquiry.

Notice thereof.

If venue be in London or Middlesex, and defendant live within forty miles of London, *eight* days notice exclusive of the day of delivery.

If venue in country, and defendant live within that distance, *ten* days; but if venue be in the country, or in Middlesex, and defendant live above that distance, *fourteen* days.

If no proceedings for four terms, a whole term's notice necessary.

B. B.

When plaintiff concludes to the country on defendant's plea, and gives notice of trial upon the paper-book, and defendant to hinder trial demurs to replication, and plaintiff joins in demurrer and obtains judgment, defendant's attorney shall accept notice of inquiry from time of giving such notice of trial.

C. B.

When plaintiff concludes to the country, and gives notice of trial on the back of the pleadings, if defendant do not join issue before the rule is out, in such case after judgment defendant's attorney shall accept notice of inquiry from time of giving said notice of trial; and where defendant demurs to plaintiff's declaration, defendant's attorney shall accept notice of inquiry on the back of joinder in demurrer; and so where defendant pleads such a dilatory plea that plaintiff is obliged to demur to it.

Writ of inquiry should be *returnable* on a general return-day, or day certain, as the original proceedings are.

Sunday is to be reckoned, if not the day of notice given.

Of making out and executing Inquiry.

The writ of inquiry is to be engrossed on a 2s. 6d. stamp parchment. In **B. B.** not to be signed, neither by bill nor original; sealing, 7d. In **C. B.** to be signed by the prothonotary; pay 1s. 4d. for first count, and 8d. every other; or 8d. for first sheet, and 4d. every other; sealing, 7d. Indorse thereon the day for which you have given notice of execution; carry it to the sheriff's office two days before you execute it, and he will cause a jury to be returned. If you think the attendance of any witnesses necessary at the execution, sue out *subpœnas* as in cases of trial; pay in London 1l. 7s. 4d. and for every witness 4d. In Middlesex 1l. 10s. 4d.; other counties 1l. 11s. 6d. Attend at the day of execution.

When the writ is returnable, call for it at sheriff's office, who will return it with inquisition thereon.

B. B.

Give a rule for judgment on inquisition at the clerk of the rules, pay 1s. 10d.; it is a *four-day rule, exclusive of the day it is given; and Sunday intervening, is not reckoned. Give it in same manner as rule to plead. When rule expires, proceed to final judgment on inquisition as in case of *postea*. Post, p. 42.

Rule not to be given till writ returnable.

C. B.

No rule necessary; but having waited *four days after return of inquiry, proceed to final judgment on inquisition, as upon *postea*. Post, p. 42.

Practical Remarks.] *Of the nature of judgment by default; and if irregularly signed, when to be complained of.—In what cases plaintiff intitled to it.—Of the nature of the writ of inquiry.—Of the writ of inquiry where there are issues in fact and in law.—Where jury omitted to assess damages at trial.—Where there are several defendants, and some plead, and others let judgment go by default.—Of the notice of executing inquiry.—How and when to be given.—Its contents as to the description of the parties, time, place, &c.—How to be served.—Of continuance and countermand thereof.—Of the return of writ of inquiry.—Of the execution thereof.—How attending thereon cures defects in notice, &c.—Of compelling witnesses to appear.—By whom to be executed.—When.—Of the conduct of the jury and sheriff thereon.—Of moving to set aside inquisition, &c.*

* Within these four days defendant may move to set aside inquisition, or in arrest of judgment. Vid. post, p. 41.

OF JUDGMENT BY CONFESSION.

When defendant has no real defence to plaintiff's suit, in order to save costs of inquiry he sometimes confesses the action with a stay of execution. This confession or *cognovit* may be written on declaration, plea, or demurrer, or on separate plain paper, and judgment is to be signed by entering an *incipitur* on a double 2s. 6d. stamp-paper, and the costs marked by master thereon. If *cognovit* should be entered in so late a stage of the proceedings as after entries paid for, or issue-roll made up, no occasion for new roll, or to pay again for entries; only pay 6d. for signing the final judgment thereon. It is usual not to sign judgment on *cognovit* until defendant has failed in his promise or undertaking.

OF JUDGMENT ON WARRANT OF ATTORNEY.

Frequently it happens that a bond to the amount of the debt, and a warrant of attorney to enter up judgment thereon, are given either to prevent an action, as a security for plaintiff's demand; or, as is sometimes the case, after the action brought, to prevent further expence.

When you enter up judgment thereon, file common bail and warrant to defend according to 25 George III.; then sign judgment on a double 2s. 6d. stamp.

If warrant of attorney be a year and day old, judgment cannot be entered up without motion *in term*, which is a motion of course, or judge's order in *vacation*, on *affidavit* that the debt, or part thereof, is due, that the warrant was duly executed, and defendant yet alive.

If warrant of attorney be above *ten* years old, motion must be made in court.

Practical Remarks.] *In what cases attorney must be present at the execution of the warrant.—Whether warrant of attorney can be revoked.—Of warrants of attorney given to and by a feme sole or feme covert.—Of the force and effect of warrants of attorney.—In case of the death of the party who gave it, or to whom it is given.—Or of the death of one when given by two.—Of entering up judgment on warrants of attorney.—Of setting aside warrants of attorney.*

It may be observed, that the above judgments by default, by confession, and on warrant of attorney, are entered up by *plaintiff* against *defendant*; but there are also judgments which may be signed and entered up by *defendant* against *plaintiff*, in case of his negligence or default in not duly prosecuting his suit. These are, Judgment of Non Pros, and as in case of a Nonsuit.

OF JUDGMENT OF NON PROS.

Plaintiff do not comply with the rules and orders of the court to be observed on his part, by declaring, replying, sur-rejoining, or entering the issue in due time, when ruled so to do, judgment of *non pros* for such his omission may be signed, which is *final*.

Get a roll; enter thereon warrant of attorney for *defendant only*; ingross *non pros* thereon; also ingross same on a double 2s. 6d. stamp-paper.

paper, and carry it to clerk of judgments in **B. B.**—prothonotary in **C. B.** who will sign same. Pay 3s.

Get costs taxed, and sue out execution; or bring an action for same, which may be done though under 40s.

Practical Remarks.] *In what cases plaintiff liable to judgment on non pros.—What defendant ought to do before signing same.—Of setting aside same for irregularity.—Of plaintiff entering a nol. prof. as to one defendant, where there are several (or in case of bankruptcy pleaded), and proceeding against the others.*

OF JUDGMENT, AS IN CASE OF A NONSUIT.

If after plaintiff has entered the issue he then neglects proceeding to trial, according to the practice of the court, defendant may move the court to enter up judgment against him, as in case of a nonsuit.

* But this motion cannot be made until plaintiff has entered the issue.

Practical Remarks.] *Of the old practice in such case by trial by proviso.—Of the alteration therein by 14 Geo. II. c. 17. and of the origin of judgment, as in case of a nonsuit.—Of the force and effect of such a judgment.—When and how to be moved for.—In what cases granted.—Of allowing further time to plaintiff to try the cause.—Of the election of defendant either to move for judgment, as in case of a nonsuit, or for costs for plaintiff's not proceeding to trial.*

SUCH BEING THE PROCESS IN THE PARTICULAR CASES ABOVE ALLUDED TO, NAMELY, WHERE THE POINT IN DISPUTE IS OF A NATURE *NOT* TO BE TRIED BY A JURY, OR WHERE JUDGMENT IS OBTAINED BY THE DEFAULT OR LACHES OF EITHER PARTY, WE WILL NOW RETURN TO THE GENERAL PROCEEDINGS, AND CONSIDER THE STEPS TO BE TAKEN IN ALL CASES AFTER THE RULE FOR JUDGMENT, AND BEFORE FINAL JUDGMENT SIGNED, AND ALSO THE MANNER OF SIGNING FINAL JUDGMENT, AND SUING OUT EXECUTION.

NEW TRIALS.

If any defect of justice happen at the trial by surprise, inadvertence, or misconduct, or the verdict be against evidence, or the judge himself has misdirected the jury, the party may apply to the court for a new trial; the granting of which is purely in the discretion of the judges.

When and how to be moved for.

Must be moved for within the four days, inclusive, allowed for that purpose, as ante p. 33.

So for setting aside inquisition on writ of inquiry, ante p. 38.

B. B.

Draw up rule and serve it; speak to clerk of the judge who tried the cause,

C. B.

Draw up rule, and serve copy; shew original at same time. Apply to

cause, if a judge of the same court, to bring his book to Westminster: if a judge of another court, for judge's report, who will deliver it to the *puisne* judge of the court where cause was tried. Notice of motion ought to be given to the other party.

to the clerk of judge who tried cause for his report, who will, if judge of the same court, report it, when motion comes on for argument; if of another court, he will send it to the *puisne* judge of that court.

Give notice to the other party of such motion.

Practical Remarks.] *New trial, what.—Difference between new trial and a venire facias de novo.—Origin of new trials.—The necessity thereof for the sake of justice.—How and at what time to be moved for.—In what cases granted.—The power of granting new trials.—Discretionary in the court.—How to proceed if new trial granted.—Of costs in cases of new trials.*

OF ARRESTING JUDGMENT.

Although the issue of fact between the parties may have been regularly decided, yet if it appear upon the face of the record, that the complaint was either not actionable in itself, or not made with sufficient precision and certainty, the party may move the court to arrest the judgment thereon.

When to move in Arrest of Judgment.

Must move in arrest of judgment before the expiration of the four day rule, for signing final judgment in *C. B.*; but in *W. B.* any time before judgment entered up.

May move in arrest of judgment after failing on motion for new trial.

How to move in Arrest of Judgment.

Speak to associate to have the *nisi prius* record in court the day you move; pay 6s. 8d.; give brief to counsel or serjeant (fee one guinea) to move *that entry of final judgment be stayed until court shall otherwise order*; draw up rule accordingly; pay 5s.; serve copy thereof on plaintiff's attorney; in order to get rid of which rule, plaintiff must give notice that he means *to move court to discharge same*, serve notice on defendant's attorney, and make affidavit of service. The matter then comes on for argument. If judgment arrested, draw up rule, and serve copy on plaintiff's attorney. If not arrested, plaintiff's attorney draws up rule, and taxes costs, &c. as usual.

Practical Remarks.] *Of the time and manner of moving in arrest of judgment.—Of the general principles or ground of moving in arrest of judgment.—In what cases judgment will be arrested, and herein of the omissions and defects cured by verdict.*

OF SIGNING FINAL JUDGMENT.

If defendant suffer the rule for judgment to expire without either moving for a new trial in case of a verdict, or to set aside inquisition in case of judgment by default, and also without moving in arrest of judgment,

B. B.

Get the *poslea*, or *inquisition*, stamped with a double 2 s. 6 d. stamp, and *deliberatur* afterwards marked on *poslea* by clerk of common bails. Pay 6 d.; take it to the master, who will *tax* the *increased* costs, and sign final judgment. Then sue out execution.

C. B.

Stamp *poslea* or *inquisition* with a double 2 s. 6 d. stamp; apply to prothonotary to tax your costs; deliver record, and *poslea* or *inquisition* to the clerk of judgments, who continues same on the roll, and awards judgment. Then sue out execution.

OF THE EXECUTION.

Final judgment being obtained, nothing remains but the *execution* of that judgment. In all personal actions, this is done by compelling the adverse party to satisfy the debt or damages, with the costs of suit recovered or assessed against him; which is effected either by a *capias ad satisfaciendum* to take his body, or a *fieri facias* to levy his goods; or by proceeding against his goods; and half of his landed property, by an *elegit*.

How to sue out same.

A *ca. sa. fi. fa.* or *elegit*, must be written on a 2 s. 6 d. stamp parchment; get blank of stationer.

B. B.

Ca. sa. and *fi. fa.* not to be signed, only sealed, for which pay 7 d. *Elegit* to be signed by signer of writs; pay 1 s. 8 d.; sealing 7 d.

C. B.

To be signed and sealed by prothonotary; pay 4 d.; sealing 7 d. If a *testat.* signing 8 d.; sealing 1 s. 2 d.

Execution must be taken out in a year and day from judgment, or party must revive judgment by *sci. fa.*

Practical Remarks.] *Of the nature of execution.*—*Of the operation and effect of each of the judicial writs above mentioned, viz. ca. sa. fi. fa. and elegit.*—*Of the election of the party of either remedy.*—*How far he is concluded thereby, and of his further satisfaction in case the first writ hath not been effectual.*—*When execution may be sued out, and by and against whom.*—*To what period it shall have relation.*—*Of precedency in executions.*—*When the execution must be joint, and where several.*—*Where execution may go.*—*Of the officer who is to execute the writ.*—*How to compel him thereto.*—*Of his power therein.*—*Of the sheriff's fees on execution.*—*Of the offence in hindering execution.*—*Of superseding execution.*—*Of outlawry upon execution.*—*Of the lien for rent on goods charged in execution.*—*Of the party's remedy in case of an irregular execution, and of setting aside the same.*

OF

OF ENTERING SATISFACTION ON THE ROLL.

When a judgment is satisfied, an entry thereof should be made upon the roll, in order that it may appear so satisfied on record.

B. R.

Get a warrant or authority from the party satisfied, directed to some attorney of the court, to enter up satisfaction on the roll; make entry out on slip of paper, or parchment; carry it to clerk of judgments, who will enter same, and deliver it over to clerk of treasury. Pay in term 3 s. in vacation something more.

C. B.

If satisfaction acknowledged in vacation, get warrant or authority as in **B. R.**; then apply to clerk of judgments, who will prepare a *fiat*, and attend with the attorney before a judge of the court, and get it signed. Clerk of judgments will then enter same at foot of the judgment, for which he will take 1 l. 7 s. 8 d. which includes all the fees. If judgment is above ten years standing, pay 5 s. more as an *extra* fee to clerk of treasury.

But if acknowledged in term, apply to clerk of treasury, who will carry roll into court, and secondary will enter satisfaction thereon. Pay 1 s. per cent. for poor's box, 2 s. to prothonotary, 1 s. to secondary.

☞ *At common law, if either of the parties died at any stage of the suit before final judgment signed, though after verdict or interlocutory judgment, the suit abated. But now, by stat. 17 Car. II. c. 8. and 8 & 9 W. III. c. 11. it is otherwise.—In all cases, however, of the death of the party either before final judgment, or after, if it happen before execution (provided the suit survive), judgment must be revived by scire facias before execution can be sued out.—See post, tit. Scire Facias.*

6
S

7

1

Analysis.

PART II.

OF

PROCEEDINGS

BY AND AGAINST

PARTICULAR PERSONS.

- | | |
|---|---|
| 1. <i>By and against Peers and Members of Parliament.</i> | 6. <i>By and against Infants.</i> |
| 2. <i>By and against Attornies.</i> | 7. <i>By and against Justices, Excise Officers, and others.</i> |
| 3. <i>By and against other Officers of the Courts.</i> | 8. <i>By and against Corporations.</i> |
| 4. <i>Against Prisoners.</i> | 9. <i>Against Hundredors.</i> |
| 5. <i>Against Bail.</i> | 10. <i>By Paupers.</i> |
-

I. OF PROCEEDINGS AGAINST PEERS AND MEMBERS OF PARLIAMENT.

THEY may be sued by *bill* or *original*.

1. *By Bill.*

Engross bill on treble 1d. stamp parchment, file it with clerk of declarations in **B. R.**; prothonotary in **C. B.** Sue out writ of *summons*, to be ingrossed on 2s. 6d. stamp parchment, signed by signer of writs in **B. R.** pay 1s. 8d.; by filazer in **C. B.** sealing 7d. Take it

it to sheriff, and get his summons for the officer to serve; pay sheriff 2s. 4d.; officer for serving summons 5s.

If no Appearance.

If defendant do not appear within four days after return of writ, sue out *distringas*, to be ingrossed on 2s. 6d. stamp parchment, signed by signer of writs in **B. R.** and filazer in **C. B.**; pay 1s. 8d.; sealing 7d.; get warrant thereon, pay 2s. 4d.; give same to officer to levy, pay him 10s. If no appearance on return of *distringas*, get it returned from sheriff, and sue out an *alias*; move to increase the issues, then issue a *pluries distringas*, and move again to increase the issues, so on until enough is levied to cover your demand; after which, move the court on the stat. of 10 G. III. c. 50. for the application of the issues to the discharge of your debt and costs.

If Defendant appear,

Which is effected by filing common bail, or entering appearance, as in unbailable actions, deliver declaration (which in some respects differs from common declarations), and proceed as in other cases.

2. *By Original.*

Draw a præcipe for the curfitor of the county, who thereupon makes out the *original*; get it sealed, and carry it to the proper sheriff, from whom get a summons for the officer to serve on defendant, who will serve it accordingly. If *no appearance* within four days after return thereof (for there are no *essoins* now allowed in personal actions), sue out *distringas*, and proceed by *alias* and *pluries*, &c. as in case of suing by bill. If defendant *appear*, declare against him (declaration differing somewhat in form from common declarations), and proceed to judgment and execution in the usual way. But observe, the persons either of peers or members of parliament cannot be taken in execution.

Memorandums of warrants to prosecute and defend, are necessary on part of plaintiff and defendant.

Practical Remarks.] *Of the nature and extent of the privilege of peers and members.—Of the different modes of proceeding against them.—Of the declaration, and wherein it differs from common cases.—Of the summons and distringas.—Of the application of the issues, and herein of the origin, intent, and construction of the stat. 10 G. III. c. 50.—Of the execution in case of judgment against peers or members of parliament.*

2. OF PROCEEDINGS BY AND AGAINST ATTORNIES.

By an Attorney.

Attorney may sue by attachment of privilege.

Make out writ on 2s. 6d. stamp, if *not* bailable, and an English notice, as in other cases. If *bailable*, insert the cause of action in writ; but it seems there is no necessity for an *ac etiam* by stat. 13 Car. II.; indorse the sum sworn to thereon, make out præcipe for the office.

B. B.

Get writ signed by signer of writs, who does it *gratis*; sealing 7d.

C. B.

Get writ marked by clerk of warrants, and then signed by prothonotary, they do it *gratis*; sealing 1d.

If bailable, get warrant thereon.

Defendant's appearance, or putting in special bail, is effected in the usual way.

Of the Declaration.

Ingross it on treble 1d. stamp paper; the form of the beginning thereof is somewhat different from other declarations. It should be delivered four days exclusive before the end of the term, to intitle plaintiff to a plea of that term. Rule to plead must be given, and demand of plea made.

If declaration be not delivered before effoin-day of the next term, defendant will be intitled to an imparlance.

In all other matters proceedings are the same as in common cases.

2. Against an Attorney.

Attorney must not be served with process, or arrested, as in other cases. From the latter he is protected as an officer of the court; and the former is rendered needless, from the supposition that he is always present in court.

Plaintiff must proceed by filing a *bill* against him, in which is set forth the cause of action, the same as in declaration.

B. B.

Having prepared the bill, ingross it on treble 1d. stamp parchment; file it with clerk of declarations in **B. B.** office, deliver a copy thereof on treble 1d. stamp paper to serve for declaration, with notice to plead thereon, as in other cases. Give rule to plead, and demand plea as in common actions.

C. B.

Having prepared bill, ingross it on treble 1d. stamp parchment; carry it to Westminster, give it to one of the criers, who will call defendant, pay 1s.; he will get it signed by prothonotary, who will mark it as entered; pay for entry 8d. per sheet, or 2s. a count. Defendant should be called three times; after which annex treble 6d. bail-piece thereto, and give a rule on the bill with secondary for defendant to appear, pay 4d.; file bill with prothonotaries, pay 4d.; then give notice in writing of the same being filed to defendant, and that unless he appears thereto in the time mentioned therein, he will be *fore-judged*. Time for appearance four or eight days, as in other cases.

Bill

Bill must be filed same time as declaration delivered or filed in other cases, or defendant intitled to an imparlance.

Bill may be filed in **B. R.** in vacation, to plead within the first four days of next term. But **Q.** in **C. B.** as defendant cannot be called in court.

Of Defendant's Appearance.

B. R.

If defendant appears and pleads, you make up issue with memorandum, and proceed as in common cases.

C. B.

If defendant appear by entering appearance with prothonotary, deliver a declaration ingrossed on treble 1d. stamp paper to him or his agent, prefix memorandum of the term when bill was filed; charge for same, and proceed. And in case defendant does not plead thereto, sign judgment as in common actions.

Of Defendant's not appearing thereto.

B. R.

If defendant do not appear and plead according to notice, rule to plead having been given, and demand of plea duly made, sign judgment by default, and proceed as in other cases.

In this court therefore the remedy against attornies is much more easy and expeditious than by fore-judger as in **C. B.**

C. B.

Of the Forejudger.

If defendant do not appear according to notice, he must be *fore-judged*, i. e. struck off the roll; to effect which, enter bill and fore-judger on the roll, beginning with memorandum, as in suits by bill in **B. R.** and then add, "*Whereupon the said A. B. being solemnly called, came not, therefore he stands forejudged from exercising his office of attorney of this court for his contumacy, &c.*"

This roll is got at prothonotary's; having made entry thereon, take same to prothonotary's, who will sign the *forejudger*, pay 2s.; then carry it to clerk of warrants, who will strike defendant off the roll, pay 1s. 4d.; docket roll with prothonotary, after which begin *de novo*, and proceed against defendant as a common person.

OF THE WRIT OF PRIVILEGE.

Where an attorney is arrested on process out of a superior court, if it be the same to which he belongs, he may be discharged *on motion*; but if not the same, he must *plead his privilege* (i. e. he must sue out his writ

writ, and produce it with his plea) *sub pede sigilli*. If the arrest were on process out of an inferior court, his writ ought to be allowed *instante*.

In the latter case, the writ being taken out, it should be carried to the inferior court, and the judge will allow it, and order defendant to be discharged by *supersedeas* out of custody.

How to sue Writ out.

Ingross writ on 2s. 6d. stamp; get a certificate from master's clerk in **B. R.** or clerk of warrants in **C. B.** that defendant is an attorney of the court; which certificate is an authority for signer of writs in **B. R.** or prothonotary in **C. B.** to sign same; pay nothing for signing; sealing, 7d.

Practical Remarks.] *Of the nature and extent of the privilege of attornies, either as plaintiffs or defendants, and herein of the capacity in which they sue or are sued.—How when they are actually in custody as prisoners.—When sued in inferior courts.—In what cases privilege is destroyed.—Of waiving their privilege.—Of the nature and effect of the forejudger in C. B. and of being restored after forejudger.—In what manner to proceed if arrested contrary to privilege.—In what cases they may procure their discharge by motion, or must plead their privilege, and how to plead the same.*

3. OF PROCEEDINGS BY AND AGAINST OTHER OFFICERS OF THE COURTS.

In **B. R.** not only the attornies, but all other officers of the court, have an equal privilege of suing by *attachment*, and being sued by *bill*; they must also be sued in their own court.

But in **C. B.** the officers, it seems, have not the privilege of being sued by bill, but only *that of being sued in their own court* by original writ.

So judges have the privilege of being sued in their own court.

4. OF PROCEEDING AGAINST PRISONERS.

The utmost degree of caution and circumspection should be observed in proceeding against prisoners, lest by any omission or neglect on part of plaintiff, they obtain their discharge.

Of the Declaration.

The mode of declaring against prisoners depends upon the following circumstances:

1st, *In whose custody defendant is; whether in the custody of the sheriff, or of the marshal or warden.*

2dly, *At whose suit defendant is in custody; whether at the suit of plaintiff himself, or under a prior commitment at the suit of another person.*

Of declaring against Defendant in Custody of the Sheriff
AT THE SUIT OF PLAINTIFF.

When defendant cannot find bail upon being arrested at plaintiff's suit, he must go to the county gaol; and if he be not removed by *hab. corpus* into the prison of the court (i. e. Marshalsea or Fleet), plaintiff may declare against him in the custody of the sheriff.

How to declare.

B. R.

If suit be by *bill*, file copy of declaration, ingrossed on treble 1 d. stamp parchment, with clerk of declarations; make three other copies thereof on treble 1 d. stamp paper, deliver *one* to gaoler or turnkey, or to the prisoner himself; annex *another* copy to an *affidavit* of such delivery or service, which must be made and sworn before a judge in town, or commissioner in country; and annex the *third* copy of declaration to an office-copy of such affidavit; carry them to clerk of rules, who will keep the original affidavit and declaration thereto annexed to file, and will examine your office-copy of affidavit, and mark thereon the day of filing affidavit, and also the rule to appear and plead.

N. B. In this court, where the process is by *bill*, declaration must state in *whose custody* defendant is; and also, that he is so in custody *at the suit of plaintiff*.

C. B.

Make only *two* copies of declaration on treble 1 d. stamp paper; take them to prothonotary to get them entered, pay for entries thereof; deliver *one* to turnkey or prisoner, and annex the *other* to an *affidavit* of such delivery (which must be made and sworn as in **B. R.**), to be filed at prothonotary's office.

Give rule to plead with *secondary*, as in common cases.

Of declaring against Defendant in Custody of Sheriff
UNDER A PRIOR COMMITMENT.

Where defendant is already in custody of any sheriff at the suit of *another person*, plaintiff may either remove him by *hab. corpus* into the prison of the court (vide post. tit. *hab. corpus*), or he may charge him with the action in the custody of the sheriff.

How to charge Defendant (already in Custody of the Sheriff) with a fresh Action.

If your action be *not bailable*, serve defendant with copy of process; and if he do not appear thereto accordingly, file common bail, or
enter

enter an appearance for him according to stat. and proceed in the usual way.

But if your action *be bailable*, make affidavit of cause of action, and sue out writ as in other cases, which must be left at sheriff's office, for sheriff to charge such defendant in custody therewith; pay 2s. 4d. Then file your bill, deliver declaration, and make copies thereof, as ante p. 50.

Of declaring against Defendant in Custody of the Marshal or Warden AT THE SUIT OF PLAINTIFF.

B. B.

If defendant be in **B. B.** prison in custody of marshal, file bill as before on treble 1 d. stamp parchment with clerk of declarations; make only *one* copy thereof, which deliver to turnkey, or to prisoner. No affidavit of such delivery or service need be made, but give a rule to plead, &c. as in other actions.

C. B.

If defendant be in the Fleet, make *two* copies of declaration on treble 1 d. stamp paper; carry them to prothonotary's, who will mark and enter them; then deliver *one* to turnkey, or prisoner, and annex the *other* to affidavit of such delivery, and file it with secondary.

Of declaring against Defendant in Custody of the Marshal or Warden UNDER A PRIOR COMMITMENT.

If defendant be in custody of marshal or warden at the suit of another person, he must be charged in custody with the fresh action at suit of plaintiff, according as it be bailable or not, as ante, p. 50. Then proceed with declaration in manner last above mentioned.

Of the TIME to Declare.

In all the above cases, plaintiff must declare before the end of *the next term after the return of the process by virtue whereof such prisoner was taken, detained, or charged in custody.*

In case of a commitment or surrender to the marshal or warden in discharge of bail *after* return of process, and *before* declaration, plaintiff must declare before the end of the term next after the making of such commitment or surrender, and due notice of such surrender given.

And if *after the arrest* of defendant, he be removed by *hab. corpus* to **B. B.** prison, or Fleet, time for plaintiff's declaring is to be computed from the *first* arresting or detention of defendant by virtue of the process.

So if defendant be taken on an escape warrant, plaintiff must declare *before* the end of the second term after such taking.

But no declaration can be delivered *until after the return* of the process.

N. B. Plaintiff cannot have rule for time to declare against prisoners.

Of the Affidavit of Delivery or Service of Declaration.

Whenever an affidavit of the delivery or service of declaration is requisite, it should be made and filed with the proper officer (*clerk of rules in B. B. or prothonotary in C. B.*) before the *first day of the next term* after the delivery of such declaration. Nor can any rule to plead be given till such affidavit filed.

Of the Time for Prisoner to plead to Declaration.

The only rule of court in *B. B.* and *C. B.* respecting this point of practice, is 5 W. & M. which states: § 3. That on all procefs returnable the first day of Easter or Michaelmas in *B. B.* (for in *C. B.* no mention is made of the return of the procefs), if declaration be delivered before *menssem paschæ*, or *crastinum animarum*, and affidavit duly filed, defendant must appear within *ten days* after Easter or Michaelmas term; or rule having been given, plaintiff may sign judgment. But having so appeared, he may then *imparle* to the next term (*unless the action were in London or Middlesex, and defendant in prison within forty miles of London or Westminster, in which case he should plead two days before the effoin-day of the next term*).

§ 4. If declaration be delivered after the above time in Easter or Michaelmas, or in any time in Hilary or Trinity term, defendant must then appear two days before the effoin-day of the next term, after which he may *imparle* to the said next term.

§ 5. If writ be returnable one term, and declaration delivered before effoin of next, plaintiff in such next term may give rule to appear and plead; and if no plea, sign judgment.

☞ The above rule, which seems not a little difficult to be understood, is, I believe, by no means strictly adhered to. Nor is that distinction preserved between the time for the appearance of defendants, and of their pleading. Prisoners in general enter no appearance, but plead in person. The clerk of the rules, however, in *B. B.* or secondary in *C. B.* always makes out the proper rule for the time wherein prisoner is to plead, which is therefore a sure and safe guide to the practitioner.

Of proceeding to Trial and Judgment.

Issue is to be made up as in common cases. If prisoner has pleaded in person, deliver it to himself, or turnkey.

But plaintiff must proceed to trial or judgment *within three terms* after declaration delivered (if he can by the course of practice); the term wherein declaration delivered being reckoned one.

So demurrer should be argued within the three terms.

In case of a surrender in discharge of bail after declaration, then within three terms after such surrender; the term wherein such surrender was made being one.

Of proceeding to Execution.

When trial has been had, or final judgment obtained, plaintiff must charge prisoner in execution *within two terms* afterwards; the term in which

which such trial was had or judgment obtained being reckoned *one* (provided no writ of error or injunction, otherwise within two terms after such obstacle be removed).

If *surrender* be made *after* trial had, or final judgment obtained, then prisoner must be charged in execution within two terms *after such surrender*; the term in which such surrender was made being *one* (provided no writ of error or injunction, as before).

☞ If trial be had, or surrender *after* trial be made in *vacation*, plaintiff has two terms *after such vacation* wherein to charge defendant in execution.

How to charge Prisoner in Execution.

1st. If in Custody of Sheriff.

Sue out a *ca. sa.* as in other cases, and get warrant thereon, which lodge with the gaoler in whose custody defendant is.

2d. If in Custody of Marshal, or Warden.

B. B.

Get rule of clerk of rules for marshal to acknowledge defendant to be in his custody, pay 5s. 6d.; serve same on marshal, who will make out such acknowledgment, pay him 10s. 6d.; apply to clerk of treasury for him to enter up final judgment on the roll, pay 2s.; make out *committitur* on slip of parchment unstamped, and file it with marshal, pay 2s.; and enter commitment in marshal's book at clerk of judgments, pay 6d. Defendant then stands charged in execution.

C. B.

Make out *hab. cor. ad satisfac.* on a 5s. stamp; get it signed by prothonotary, pay 1s. 4d. sealing 7d.; procure judge's *fiat* thereon (4s.); take it to clerk of papers at the Fleet four days before return thereof, pay 9s. 2d.; apply to clerk of treasury to enter final judgment on roll, pay 2s.; pay officer for bringing up defendant 10s. 6d.; crier 1s.; secondary 10s.

Of Superseas.

If plaintiff do not declare, and file affidavit of service of declaration, and proceed to trial, judgment, and execution, in manner and within the times limited by the rules of court, as above respectively mentioned, defendant may obtain his discharge by *superseas*.

How to obtain Superseas.

1. For Want of Declaration.

If Defendant in Custody of Sheriff.

B. B.

Get certificate from clerk of declarations, that no bill is filed against defendant; also certificate from

C. B.

Get certificate from prothonotary's office, that no declaration is filed against defendant; also certificate

from gaoler of the causes he is charged with, and affidavit of gaoler's signing same; take out judge's summons to shew cause why writ of *superfedeas* should not issue for defendant's discharge; serve same on plaintiff's attorney; *one* summons only is necessary; if he neglect attending, make affidavit of such service and attendance on *your* part, and judge will make an order for *superfedeas* on defendant's filing common bail; take *superfedeas* to sheriff, who will discharge prisoner. Whole expence about 8s. 9d.

from gaoler of the causes, prisoner stands charged with; take out *summons* to shew cause why defendant should not be discharged for want of declaration; serve same on plaintiff's attorney; *three* summonses are necessary. If no attendance on either, make affidavit of services and of your own attendance.

Get judge's *fiat*, carry it to filazer's, who signed original writ, to be filed. Take *superfedeas*, prepared and ingrossed, with you, and filazer will sign same; but you must first enter *appearance* with him, as in a common case.

If Defendant in-Custody of Marshal or Warden.

B. B.

If in custody of *marshal*, get certificate of clerk of declarations, and of clerk of papers in **B. B.** prison, to the same purport as before; take out summons, and judge will order common bail to be filed; and upon certificate thereof from clerk of common bails, marshal will discharge defendant *without* any *superfedeas*.

C. B.

If in custody of *warden*, apply to clerk of papers in Fleet for the causes defendant is charged with; then proceed by summons as before to obtain *superfedeas*, which is *always* necessary in this court for defendant's discharge.

2. *For Want of proceeding to Trial, Judgment, or Execution.*

The manner of procuring defendant's discharge for want of plaintiff's proceeding to trial, &c. is very nearly similar to the mode above mentioned, according as prisoner may be in custody of *sheriff*, or of *marshal* or *warden*, only the summons must be drawn agreeable to the *fact*; and *three* summonses, in case of non-attendance, will be always necessary. Also, in **C. B.** *superfedeas* must be signed by prothonotary instead of filazer.

☞ Having endeavoured to render the mode of proceeding against prisoners clear and intelligible, by dividing the subject into the above several heads, let it suffice to observe, that the Practical Remarks in further illustration thereof, should be arranged under the respective titles to which they may more immediately relate.

5. OF PROCEEDING AGAINST BAIL.

After judgment against defendant, if he do not satisfy the debt and costs, or render himself a prisoner, plaintiff may proceed against the bail upon their recognizance, and this either by *action of debt upon the recognizance*, or by *scire facias*.

But

But before either remedy be pursued against the bail, plaintiff must first proceed against the principal by suing out a *ca. sa.* (if by *bill*, it must have eight days between teste and return; if by *original*, fifteen), which writ must be left in sheriff's office *four days* before return, and must be returned *non est inventus*, as it is only on principal's default that bail become liable. The *ca. sa.* ought to be filed before replication, if defendant plead; no *ca. sa.* sued out.

How to proceed.

1. By Action upon the Recognizance.

Enter on roll declaration and recognizance of bail, as of the term declaration was of; carry in same to be filed in treasury, and docquet entry thereof, which is done in the usual way of carrying in rolls and docqueting entries; sue out process against bail, and proceed as in other cases.

☞ If defendant plead *nul tiel record*, and roll be carried in any time before replication, it is sufficient. Let the amount of debt be what it may, you cannot hold defendant to bail; and you should insert in your writ the following "*ac etiam:*" And also to a bill of the said J. D. against the said R. F. and C. D. in a plea of debt upon recognizance, according to the custom of our court before us to be exhibited.

2. By Scire Facias.

Proceed the same in suing out and filing *ca. sa.* entering recognizance on roll, and carrying in same, as above mentioned.

After which sue out a *scire facias* ingrossed on a 2 s. 6 d. stamp parchment; signing 1 s. 8 d. sealing 7 d.: get it returned *nihil*, by leaving it at sheriff's office for that purpose; then sue out an *alias sci. fa.*; leave it *four days exclusive* of return day at sheriff's office; and upon a *nihil* also returned to that, give rule for judgment, on expiration whereof sign judgment on *sci. fa.*

Let teste of first *sci. fa.* if by *bill*, be the return day of *ca. sa.*; if by *original*, the *quarto die post*. Let teste of *alias sci. fa.* be the return of the first.

If you wish to summon the bail on the first *sci. fa.* and have a *sci. feci* returned thereon, get summons from sheriff for that purpose; pay 2 s. 4 d.; officer will summon them; pay 5 s. for each summoned. *Sci. fa.* must lie in the office *four days exclusive* of return day. When *sci. feci* is returned thereon, give rule for judgment, and proceed as above.

Two *sci. fa.*'s. with *nihil*s, or one *sci. fa.* with *sci. feci* returned, are necessary in order to proceed to judgment.

If bail appear, plaintiff must declare on the *sci. fa.* (the declaration being little more than the recital of the writ), and proceed as in other cases. Vid. post. tit. *Scire Facias*.

Practical Remarks.] Of the nature and effect of the several remedies against the bail by action on recognizance and *scire facias*.—What is necessary to be done before any proceedings against bail, and herein of suing out the *ca. sa.* getting same returned.—Entering recognizance on roll, &c.—Of the teste and return of the *sci. fa.*—Of the bail being fixed, and of relieving them after they are said to be fixed.—Of relieving them after error brought

on the principal judgment.—Of defendant's appearing to the *sci. fa.*—Of the further proceedings therein.—Declaration.—Plea, and herein what may be pleaded, &c.—Judgment and execution.

6. OF PROCEEDING BY AND AGAINST INFANTS.

An infant (by which is meant every person under the age of 21) can neither prosecute nor defend a suit by *attorney* (except in certain particular cases); but must, if plaintiff in the action, carry on the same by his *next friend or guardian*; and, if defendant, by his *guardian only*.

1. Where Infant is Plaintiff.

Where the infant is plaintiff, if his *prochein ami* or *guardian* will appear in *person*, together with the infant, before any judge of the court, and pray to be admitted, he will be so accordingly. But if they do not appear in *person*, guardian must be appointed by *petition*; in which case, draw up petition on treble 6d. stamp, in name of the infant, praying the judge to assign A. B. as his guardian to prosecute his suit against C. D.

To which must be subscribed A. B.'s *consent* to accept such guardianship. Annex thereto an *affidavit* duly sworn before a judge, ingrossed on treble 6d. stamp paper, of some person who saw such petition signed by the infant, and likewise A. B. subscribe his consent thereto; carry them to judge's chamber, and get an order thereon; pay 12s. Take order to clerk of rules for rule thereon; pay 5s. Affix copy of rule to declaration.

2. Where Infant is Defendant.

Where infant is defendant, he cannot appear nor plead till guardian is appointed, which must be done in same manner as above, the tenor of the *petition* being altered accordingly, and copy of rule when obtained affixed to *plea*.

If infant neglect to appoint a guardian in *six days* after application to him by plaintiff's attorney for that purpose, move the court for defendant to name his guardian, or for plaintiff to be at liberty to appoint one for him.

Practical Remarks.] In what cases infants need not prosecute by guardian. — At what time guardian must be appointed. — How plaintiff is to proceed if infant neglect to appoint a guardian. — Of the consequences of not appearing by guardian when he ought so to do. — Of the costs when an infant is plaintiff or defendant.

7. OF PROCEEDINGS AGAINST JUSTICES, CONSTABLES, EXCISE AND CUSTOM-HOUSE OFFICERS, AND OTHERS.

There are certain acts of parliament for the protection of magistrates and officers acting in the execution of their respective offices, imposing certain restrictions and regulations which must be strictly adhered to by all persons about to prosecute for offences committed by any of them in their official capacities. To treat of these statutes respectively, would exceed

exceed the limits of this Analysis. I shall only observe, that the general directions therein contained are, that notice of the party's intention to bring such action must be given *one month before the commencement of the suit, and within six months after cause of action*; that nothing can be given in evidence *which is not expressed in the notice*; that defendant may tender amends, if he think proper, and may plead the general issue, and give the special matter in evidence.

8. OF PROCEEDING BY AND AGAINST CORPORATIONS.

Corporations may *sue* in their own name, by an attorney appointed under their seal, and may proceed in the usual way by *latitat*, &c.

But if they *be sued*, it must be by *original*, to be had of the curfitor; whereon a *summons* is taken from the sheriff's-office, directed to an officer, who leaves the same with clerk of corporation. The future proceedings are the same as against *peers and members of parliament*, which see above.

Practical Remarks.] *Of the different kinds of corporations, aggregate and sole. — Of their respective powers and capacities. — How each ought to sue and be sued. — Of declaring in ejectment on a demise by a corporation.*

9. OF PROCEEDING AGAINST HUNDREDORS.

In certain particular cases where a robbery is committed, and the person robbed strictly pursues the directions in the different statutes on this head, he may maintain an action against the *hundred* to reimburse him his loss.

The statutes above alluded to are 13 Edw. I. c. 1.; 27 Eliz. c. 13.; 29 Car. II. c. 7.; 8 Geo. II. c. 16.; 22 Geo. II. c. 24.; wherein are contained the necessary steps to be taken in order to be entitled to this remedy.

10. OF PROCEEDING BY PAUPERS.

By virtue of the statute 11 Hen. VII. c. 12. every *poor* person having just cause of action against any one, shall have writs, counsel, attornies, &c. necessary to prosecute his claim, *gratis*.

It has been since held, that, in order to come within this statute, the *pauper* must not be worth 5 l. (wearing apparel excepted).

The mode of proceeding is by *petition* to one of the judges to be admitted *in formâ pauperis*, which petition is engrossed on a treble 6 d. stamp-paper, and an affidavit, on like stamp, annexed, that the petitioner is not worth 5 l. as above mentioned. Carry them to judge's chambers, and get an order thereon; pay 2 s. 6 d.; proceed then in the usual way. To the declaration annex copy of rule, petition, order and affidavit; the writ and all the pleadings are *without stamps*; and clerk of papers, and other officers, as also the counsel, who are appointed by the court, act *gratis*.

But if a verdict be recovered for above 5 l. you then pay the court fees, and for passing record.

The statute does not extend to admit paupers to defend a suit *in formâ pauperis*.

THE
[Faint, illegible text]

[Faint, illegible text]

[Faint, illegible text]

[Faint, illegible text]

[Faint, illegible text]

Analysis.

PART III.

OF
P R O C E E D I N G
IN
PARTICULAR ACTIONS AND CASES;
ALPHABETICALLY ARRANGED.

Arbitration.
Audita Querela.
Dower.
Ejectment.
Error.
False Judgment.
Habeas Corpus.
Outlawry.

Partition.
Prohibition.
Quare Impedit.
Qui tam Actions.
Replevin.
Right, Writ of.
Scire Facias.
Waste.

ARBITRATION.

THERE are three kinds of references to arbitration: 1st, Where causes *upon trial* are referred, as mentioned *ante* p. 31.: 2d, Where the parties, after the commencement of, and pending a suit, but *before* trial, submit the cause to arbitration, by entering into arbitration bonds: 3d, Where the matter in dispute is submitted to arbitration, by arbitration bonds being entered into *before the commencement* of any suit.

At

At common law, in case of *disobedience* to an award made under either of the *two first kinds* of references above mentioned, the courts would grant an *attachment* to compel the performance thereof.

They would also, upon motion, set aside the award for collusion, or gross misbehaviour of the arbitrators; but not so in case of disobedience to an award made under the *last* kind of reference. The reason was, because in the *two first* cases the parties were before the court, an action had been commenced, and was still pending: they had therefore cognizance of the matter in dispute, and of the proceedings in the cause; which was not so in the *last* case, the submission being made *before* any legal proceedings taken. If therefore the party against whom the award was made were refractory, the only mode to compel obedience thereto, was by *action* on the bond for the penalties; and if there were any collusion or mal-practices in making the award, the only relief for the injured party was in *equity*.

But now, by *statute 9 & 10 Will. III. c. 15*, this defect at common law is remedied, and parties submitting matters in dispute to arbitration, by entering into bonds *before* the commencement of any suit, are entitled to the same redress in the courts of law, as if the reference to arbitration had been made at the *trial* of the cause, or *after* action brought, and whilst it was pending.

This is done by the parties agreeing that such their submission should be made a *rule of court*; which agreement, upon producing an *affidavit* made by the witnesses thereto, or any of them, shall be entered and filed of record, and a rule be thereupon made by the court, *that the parties shall submit to, and be concluded by, the arbitration or umpirage*: and, in case of *disobedience*, the party neglecting shall be subject to all the penalties of contemning a rule of court, unless such award shall be set aside for corruption, or other misbehaviour, in the arbitrators or umpire, proved on oath to the court *before the last day of the next term* after the award is made.

In all cases, therefore, where matters in dispute are submitted to arbitration, *no cause being before the court*, it is of importance to the parties to make an agreement, as directed by the above statute, that such submission shall be made a *rule of court*.

Practical Remarks.] Of the nature and effect of submissions to arbitration.—Of the different kinds of references to arbitration.—Of the time for making the award.—Of enlarging the time.—Of the award itself, and what it ought to be.—Of performance of the award.—Of disobedience thereto.—The remedy at common law in case of disobedience.—Remedy by statute 9 & 10 Will. III.—Construction of that statute.—Of the attachment, and motion for same.—Of the action on arbitration-bond, and what may be pleaded thereto.—Of setting aside the award.—For what causes it will be set aside.—How to set award aside.—When to move the court to set it aside.

AUDITA QUERELA.

An *audita querela* is a writ of a most remedial nature. It lies in all cases where a person is in execution, or in danger thereof, on a judgment or otherwise, who has matter of *fact* or of *record* sufficient to avoid such

such execution, which he could not plead, or in any other manner take advantage of.

As if a *release* has been given since judgment, or the debt or demand is in any other way discharged, and no satisfaction entered on record.

So it lies for *bail* when judgment is obtained against them by *scire facias*, and the original judgment against their *principal* happens afterwards to be *reversed*.

Of the Process.

If the *audita querela* be founded on *record*, or the party be in *actual* custody, the process thereon, when the writ is *allowed* (which it must always be in open court), is a *scire facias*; and in case of default by defendant upon a *scire feci*, or two *nibils* returned, plaintiff shall have judgment. See post, tit. *Scire Facias*.

But if the *audita querela* be grounded on matter of *fact*, or the party be *not* in custody, but it be brought *quia timet*, &c. the process thereon, when writ allowed, &c. is a *venire facias*; and on default thereto, a *distingas ad infinitum* to compel an appearance.

From the indulgence now shewn by the courts in granting summary relief upon *motion*, the writ of *audita querela* is rendered almost useless.

Practical Remarks.] *Of the nature and effect of an audita querela.—When it lies.—At what time.—Of the process thereon.—Out of what court it shall be.—Of the allowance of the writ.—Of bail to audita querela.—Of the supersedeas.—Of the declaration.—Of judgment.—In what cases court will now relieve on motion.*

DOWER.

Every man's wife, by *law*, is entitled to be endowed of all lands and tenements of which her husband, at any time during coverture, was seised, in fee *simple*, or in fee *tail general*, or as heir in *special tail*, and to which any issue that she might have had could by possibility have been heir.—Dower is the *third* part of such lands, or, if *gavelkind*, a *moiety*. It ought to be assigned to the widow by the heir or his guardian within 40 days, called her *quarentine*, after the husband's death.

If therefore dower be not duly assigned, the widow has her remedy at law by writ of dower.

In case she has *part* of her dower in the same *ville*, the process must be by writ of *right of dower*; but if the *whole* be withheld from her, she then proceeds by writ of dower, *unde nil habet*. The latter, being the usual mode, is the only process here treated of.

Of the Process in Dower.

The process thereon is by *summons*, *grand cape*, and *petit cape*. Make out *præcipe*; carry it to *curitor*; he will procure *summons*; lodge it with the sheriff of the county where the lands lie. It is to be served upon the *tenant*, or on the *land*. After which, and 14 days before the return thereof, *proclamation* must be made of the *summons*, on a Sunday immediately

immediately after divine service, at the *parish church door* where the lands lie; which proclamation must be returned with the names of the *summoners* indorsed on the writ, agreeable to 31 *Eliz. c. 4.* otherwise an *alias* and *pluries summons* must be awarded until such return be made, and not a *grand cape*.

If Tenant do not appear.

If upon the *quarto die post* of the return of the summons tenant *do neither appear* nor cast an *essoin*; or if an *essoin* be cast, and at the day given by *adjournment* of the *essoin* tenant does not appear; the next process is the writ of *grand cape*; but demandant must first make her demand. The *grand cape* is a writ commanding the sheriff to seize the *third part* of the lands, &c. demanded, or a *moiety* thereof, if *gavelkind*, by the view of two honest and lawful men of the county, and to *summons* the tenant to appear on return of the writ, and shew why he did not obey the former summons. If sheriff do not return the writ, sue out, at the return thereof, an *alias grand cape*. If *nulla tenementa* be returned, a *testatum grand cape* issues; but if sheriff execute the writ, he makes a return accordingly.

Tenant may appear on the return of the *grand cape*, which if he neglect doing, *final judgment* shall be against him.

Of Tenant's Appearance.

If tenant *appear*, either on the *summons* or *grand cape*, demandant must *count* upon her writ; after which tenant may, in most cases, have a *view* of the land demanded, and may plead to the count either in *abatement* or *bar*; upon which issue is joined, and parties proceed to trial thereon.

Of Default after Appearance, and herein of the Petit Cape.

If in any other term *after* tenant's appearance he make default, a *petit cape* lies, the *grand cape* being only used in case of tenant's default *before* his appearance in *chief*.

And if on the return of the *petit cape* he does not save his default, *final judgment* shall be against him.

Of Final Judgment, and of the Writ of Inquiry to assess the Value and Damages.

Final judgment in dower is *quod querens recuperet seisinam de tertia parte tenement' petit'*; or, if of *gavelkind*, *de dimidio*, &c.: but if the dower so recovered be of lands whereof the husband *died seised*, demandant, by *stat. of Merton 20 Hen. III. c. 1.* is further entitled to *damages*, i. e. the *value* of her dower from the time of his death to the judgment.

She should make a *suggestion* therefore on roll that her husband *died so seised*, and there shall then issue a *writ of inquiry*, to inquire of the *damages*; or the jury who try the issue may inquire thereof; or demandant may *remit* the value and *damages*, and have an *habere seisinam* immediately.

If judgment be by default, and the husband died seised, writ of inquiry shall go to assess the value and damages which shall be allowed to the time of inquisition.

☞ There is at this day seldom occasion to resort to the above proceedings, since, upon most marriages, or if the estate be considerable, dower is generally barred by jointure, agreeable to the statute of uses 27 Hen. VIII. c. 10.

EJECTMENT.

The doctrine of ejectment is both comprehensive and intricate, and the practice, from being founded upon legal fictions, is rendered to the student difficult to be understood. In order to shew the reason and utility of these fictions, and to make the process in ejectment appear more intelligible, it might be proper, by way of introduction, to consider the nature of the remedy by ejectment, for what an ejectment lies, how the mode of proceeding therein was at common law, and of the alterations which have since taken place in the modern practice; after which should be explained the present manner of proceeding in ejectment according to the circumstances of the case.

In all cases where an ejectment is brought to recover possession of any premises, such premises must be either tenanted or untenanted.

1. Of the Process where there is a Tenant upon the Premises.

Of the Declaration and Notice.

Prepare declaration upon treble 1 d. stamp paper (the names both of plaintiff and defendant, who is the casual ejector, being fictitious); subscribe thereto a notice, directed to the real tenant in possession for him to appear and defend his title to the premises, or else that the defendant (the casual ejector) will suffer judgment to be signed against him by default, and he (the tenant in possession) will be turned out of the premises. Serve an exact copy of this declaration and notice (upon the like treble 1 d. stamp) on the tenant in possession, and if there be several tenants, serve copy on each; but keep original declaration in your own possession. If the premises lie in London or Middlesex, the notice may be to appear the first day of the next term; but if in any other county, then it must be to appear the next term generally,

In the first case it should be served before the effoin^d-day of the term, or defendant is not bound to plead till the term next after service; and in the last it should be served before the effoin-day of the issuable terms, or he need not plead in time to go to trial at the assizes.

This declaration and notice are as the first process, and may be either by bill or original: the latter has this advantage, that if defendant bring a writ of error, it must be in the first instance in parliament.

Practical Remarks.] Of the nature of the declaration, and the parties thereto.—In what county to be brought.—What it should contain.—Of laying the demise therein.—Of single and double demises.—Of the nature and effect of the notice.—Its contents.—Of the time for defendant's appearance therein mentioned.—By whom notice to be signed.—Of the time and manner of the service thereof, and what shall be deemed a good notice.

Of

Of moving for Judgment against Casual Ejector.

Having served copy of declaration and notice, you must then, in order to compel an *appearance* thereto, or be intitled to *judgment by default*, move for judgment against casual ejector; upon which motion a rule *nisi* is drawn up, and unless the *tenant in possession* appear within the time mentioned therein, judgment may be entered against the defendant (*the casual ejector*) by default.

This motion should, in all cases, be made, unless defendant's attorney promise to appear, and plaintiff's attorney can *safely* confide therein.

How to move for Judgment.

Make affidavit of the *service* of copy of declaration, annex it to the *original* declaration in your own custody, give it to counsellor or serjeant, with brief, and 10s. 6d. to move for judgment; it is a motion of *course*; he puts his name to declaration, and gives it to clerk of rules in *B. B.* or secondary in *C. B.* with the affidavit, who keeps the same. It is proper therefore, *before* motion, to take *copy* of declaration, otherwise you must afterwards pay 1 s. for office copy thereof.

Affidavit to be ingrossed on treble 6d. stamp, and to be sworn before judge in town, or commissioner in the country.

When to move for Judgment, and of the Time allowed for Appearance.

If premises lie in *London* or *Middlesex*, and notice in declaration be to appear the *first day of term*, you may move on *that day*, or at any time the beginning of term, and tenant has but *four days inclusive* to appear after motion. If moved *late* in term, court will not allow more than two or three days; but if not moved before the *four last days* of term, he has until two days before the *effoin-day* of the subsequent term.

If notice of declaration be to appear *generally*, tenant has the *whole term* to appear in.

If premises lie in any *other* county, though declaration be delivered before *effoin-day* of *Easter* or *Michaelmas* term, with notice to plead in those terms, yet tenant has till four days exclusive of the day on which term ends, *after the end of the next issuable terms*, viz. *Hilary*, or *Trinity*, to appear in; and if it be in a county where assizes are but once a year, till four days after the *issuable term preceding* such assizes. Term ending on *Wednesday*, appearance any time on the *Monday* following is good.

In *B. B.* judgment against casual ejector must be moved for the *same term* in which notice was to appear; but in *C. B.* in country ejectments, if the notice were to appear *Easter* or *Michaelmas* term, you need not move for judgment till the next *issuable* term.

Of signing Judgment against Casual Ejector.

If tenant do not appear and plead according to rule *nisi*, as mentioned above, no rule to plead need be given, but sign judgment against *casual ejector*.

B. B.

Search the ejectment books at all the judges chambers for plea and rule; if none filed, get rule for judgment of clerk of rules, 5s.; make an *incipitur* of declaration on a double 2s. 6d. stamp, and also on a roll; produce your rule for judgment, and clerk of judgments will sign it, 4s. 2d.; make out *writ of possession* on 2s. 6d. stamp parchment, get it signed with signer of writs, 1s. 8d.; sealing 7d.

Make preceipe for the *writ of possession*; get sheriff's warrant, pay 2s. 4d.; give it to a sheriff's-officer, who will execute same by giving possession of premises to the real plaintiff.

C. B.

Search plea-book at prothonotary's office for plea and rule; if none filed, draw up rule for judgment with secondary; make an *incipitur* of declaration on sheet of double 2s. 6d. stamp paper; and on a roll of that term, make out warrant for defendant, get it signed at warrant of attorney's office, pay signing 8d. if not above four defendants; if five, there must be two warrants; if nine, three, and so on. Carry papers to prothonotary, who will sign judgment, pay 12s. 8d.; make out *writ of possession* as in **B. B.** (only no *preceipe* necessary), and get sheriff's warrant thereon.

Practical Remarks.] *Of the intent and effect of moving for judgment against casual ejector.—Of the affidavit for that purpose.—Its contents.—Of the rule nisi in consequence of the motion.—Of the time to move for same, and of tenant's appearance in consequence thereof.—When to sign judgment in case of tenant's default.—Of the effect of judgment against casual ejector.*

Of appearing and pleading in Ejectment.

If the tenant appear in pursuance of the rule above mentioned, or otherwise, he may either defend for the whole of the premises for which the ejectment is brought, or only for a part.

Tenants must give notice to their landlords agreeable to 11 G. II. c. 19. of their being served with declaration in ejectment, who may either be made defendants together with their tenants, or in the stead of them, if the latter refuse to defend the suit: but in case of landlord becoming defendant, brief must be first given to counsel to be signed for that purpose, fee 10s. 6d.; and rule be drawn up at clerk of rules, for which pay 8s. and copy thereof annexed to plea, and consent-rule. No affidavit necessary.

How to appear and plead.

If the tenant or landlord appear, his attorney gets a blank *consent-rule*, unstamped, from a stationer, if in **B. B.** or from the secondary in **C. B.** then fills it up, making the tenant or landlord defendant instead of the casual ejector, intitling the cause in the margin, and inserting the premises as described in the declaration, or such part thereof as the party would wish to defend; the attorney for the defendant then signs his name at the bottom, leaving a blank space for the plaintiff's attorney to do the like (for this is rather an agreement between the parties than the rule itself, which is drawn out by the officer); he also ingrosses the general issue on stamped paper, and afterwards annexes the same to the

rule (and if there be a rule to admit the landlord defendant, the tenant having refused, annex that also); then file *common bail*, if by *bill* in **B. R.** with the clerk of the common bails; and if by *original* in **B. R.** enter an *appearance* with the filazer, who will mark it; or if in **C. B.** enter *appearance* with the proper filazer, who will stamp the rule; which being done, if the proceedings are in **B. R.** you carry and leave this rule, &c. at any of the judge's chambers; or if in **C. B.** you carry and leave the same with the prothonotary.

Of searching for Plea, and proceeding to Trial, Judgment, and Execution.

When rule for judgment against casual ejector, or the time for appearance is out, plaintiff's attorney must search for plea and consent-rule

B. R.

At the respective judges chambers; when found, give receipt for the same, and sign your name over that of defendant's attorney; carry it to *clerk of rules*, who files it, and draws up consent-rule on stamp. Make copy of rule on plain paper, and when the issue is made up, annex the copy thereto, and deliver them to defendant's attorney for trial.

C. B.

At prothonotary's office; if found, sign your name, over that of defendant's attorney; take rule to *secondary's*, who makes out two copies thereof; make up the issue as in other cases, and annex one of the copies of the rule thereto.

Notice of trial, &c. as in other cases; and if *issue* not paid for, draw up rule for judgment against casual ejector.

If verdict for plaintiff, tax costs in the usual way, and either take out a *ca. sa.* or *fi. sa.* for the costs, and an *hab. fac. poss.* for the possession separately; or an *hab. fac. poss.* with *ca. sa.* or *fi. sa.* for costs, in one writ.

Practical Remarks.] *Of the time of appearing.—Of the construction of 11 G. II. c. 19. § 12. respecting tenants giving notice to their landlords of having been served with ejectments.—Of the construction of § 3. of that statute, enabling landlords to become defendants.—Of other persons interested in the premises being made defendants, and what interest is requisite.—Of the nature of the consent-rule.—Of the manner of entering into same, and pleading.—Of defending only for part.—Of defendant's withdrawing his plea, and confessing the action.—Of making up issue and record.—Of defendant refusing on trial to confess lease, entry, and ouster, and thereby plaintiff being nonsuited, and how plaintiff is to proceed in such case.*

2d. Of the Process where the Premises are vacated or deserted by the Tenant.

In all cases where the premises are *untenanted* (except in the case of proceeding under the 4 G. II. which will be considered hereafter), the mode of recovering possession is, according to the old common law practice, by an *actual lease, entry, and ouster*, as follows:

A (the

A (the person claiming title) signs a letter of attorney to empower B to execute a lease in his name of the premises in question to C (or the owner of the land himself, without giving such letter of attorney, may execute the lease), which is done upon the premises, B and C being only thereon; then B, after having executed such lease, leaves C in possession of the premises, who is turned out by D, to whom, while on the premises, E delivers a declaration in ejectment; and then on *affidavit* of the due execution of the letter of attorney, and executing the lease in the above form, you move for judgment.

The declaration is the same as other declarations in ejectment, only instead of a *fiction* plaintiff and defendant, C the *real* lessee, and D the ejector, as above mentioned, are made plaintiff and defendant. Declaration must be delivered, as in other cases, before the *essoin*-day of the term, to intitle plaintiff to judgment as of that term; but instead of *notice* at the end of declaration, as in other ejectments, let it be a notice to appear in same way as subscribed to *common process*. Plaintiff should give rule to plead, as in other actions; and if no plea be put in within due time, is then intitled to judgment.

Of Proceeding under the 4th G. II. where Premises are untenanted.

This stat. only extends to cases between landlords and tenants, where a lease has been executed with *power of re-entry* in case of non-payment of *rent*, and where *half a year's rent* is due, and *no sufficient distress* on the premises to satisfy the same. In which case it is only necessary for plaintiff's attorney to affix declaration and notice (prepared in the usual way) upon the door of the demised messuage, or on some notorious part of the demised lands, and this shall be deemed a good service. And in case of judgment against *casual ejector*, or of nonsuit upon trial by defendant's not confessing *lease, entry, and ouster*, it shall be made appear to the court by *affidavit*, or it be *proved* upon trial, if defendant try the issue, that the case is within the statute as above mentioned, and that declaration and notice were duly affixed on the premises, the lessor shall recover judgment, and have execution.

Of proceeding in Ejectment by Mortgagee.

This may be either to get into receipt of the *rents and profits*, or to recover *possession*. To do the *first*, ejectment may be brought without any notice to quit, although the lease be made before the mortgage; but to get into *possession*, proper notice must be given, and plaintiff proceed in the usual way. If the premises be *untenanted*, let a lease be sealed thereon, and the same mode pursued as just above described.

General Practical Remarks.] *Of process in ejectment, where a corporation are lessors.—Of process where an infant is defendant.—Of joint defendants, some appearing, and others not.—Of the death of lessor of plaintiff before verdict.—Of the death of one of defendants before trial.—Of the verdict and judgment.—Of arresting judgment.—Of new trial.—Of the attornment of the tenants.—Of bringing error in ejectment.—Of the writ of possession.*

possession, and execution thereof.—Of the return thereof.—Of bringing a second ejectment.—Of recovering the mesne profits.

ERROR.

To amend mistakes in proceedings of courts of record, writs of error lie; but to amend errors in courts *not* of record, a writ of *false judgment* lies.

On proceedings in *C. B.* or any other inferior court, writ of error is to be brought in *B. R.* On proceedings in *B. R.* if by *bill*, writ of error to be brought in *exchequer chamber*; if by original, in *house of lords*. On proceedings on the *law-side* of the exchequer, error to be brought in *exchequer chamber*, and from thence it lies to the house of lords.

Practical Remarks.] *Of the nature and effect of a writ of error.—In what cases, and on what judgments, it lies.—From and into what courts.—Who may bring a writ of error.—Against whom, and at what time to be brought.—Of the different kinds of error.*

Of Process in Error.

FROM *C. B.* INTO *B. R.*

Take *præcipe* to proper *curfitor*, who will make out writ, and get it sealed, pay 14s. This is usually done before final judgment, in order to get it *allowed* in time. Writs of error are *tested* the day on which the *præcipe* is left with the *curfitor*, but must not be made *returnable* till after judgment.

Of the Allowance.

Carry writ to Mr. Hough, clerk of errors of *C. B.* to get same allowed, which is done by his writing *allowance* on slip of paper, pay 2l. 2s. 6d. serve copy thereof on defendant's attorney.

Writ of error is no *superfedeas* until allowance.

The usual and safest way is to get writ allowed before the time for taxing costs, and for defendant's attorney to attend taxation, and then serve plaintiff's attorney with allowance.

Plaintiff in original action (*defendant in error*) should take care to get original writ of *curfitor*, and duly file it with *custos brevium*, or want thereof will be good cause of error. If not sued out in the course of the vacation after the term judgment is signed, *curfitor* cannot grant it without an order from *master of the rolls*, which must be obtained by petition to him for that purpose, and is attended both with trouble and expence.

Practical Remarks.] *Of the operation of a writ of error as a superfedeas.—Of the necessity of getting same allowed.—Of the use and effect of the service of allowance.—Of the allowance after execution.*

Of Bail in Error.

Bail is requisite in all cases *after verdict*, and in actions of debt on bond, for the payment of money only.

When

When to be put in.

Within four days after delivery of writ to the clerk of errors.

How to be put in.

Having given the names and description of the bail to clerk of errors, he will enter them in his book, and then attend you to a judge's chambers with the bail to take the recognizance, pay 1l. 4s.; but if after office-hours, 1l. 7s. 4d.

Of Notice of Bail, excepting to, adding, and justifying Bail.

Bail being put in, give notice thereof to defendant's attorney, who may except to same within twenty days.

The method of exception is by getting rule for better bail of clerk of errors, and serving copy thereof on plaintiff's attorney. It is a four-day rule, within which time bail must justify, if in term, in open court; if in vacation, conditionally at a judge's chambers, and afterwards in court the first day of the next term.

In case other bail are added, such added bail must be put in within two days after service of the rule, and notice thereof given, that an inquiry may be made after the added bail; and they must justify within the four days stipulated by the rule in manner above mentioned.

After justification, clerk of errors marks bail-piece.

Practical Remarks.] *Of the common law as to bail in error.—Of the statutes on this head.—The construction thereof, and in what cases bail is, or is not, requisite.—Of the time when to be put in.—Of justifying, &c.—Of the nature of the recognizance of bail in error.*

Of the Transcript.

On bail being perfected, or if no bail required, then, on return of writ, let defendant get rule of the clerk of errors for plaintiff to transcribe the record; pay 4s.

Serve copy on plaintiff's attorney.—It is an eight-day rule.

By whom Transcript made, and when carried over.

The clerk of errors makes out transcript, but plaintiff in error pays for same. By a late order of the judges, the transcript must be carried over, if required, on the ninth day after the rule obtained; and to enable the clerk of errors to comply with this order, the judges have also given direction, that the attorney for the defendant is to furnish the officer with the papers complete, or the roll itself, with final judgment entered. If the transcript-money is not paid upon the service of the rule, or within a reasonable time after, the clerk of the errors may sign *non pros*. He is not obliged to wait the expiration of the rule. The time allowed by the rule is matter of accommodation to the officer to make out the transcript, and not as a favour to the plaintiff in error to pay the money.

Of filing Transcript.

After transcript is made out, it is to be filed with *signer of writs* in **B. B.** and each of the parties are to have a copy thereof, which serves afterwards as the paper-book. It is at this period (when the transcript is brought in) that the *superior* court gets possession of the cause, and from henceforth the respective officers belonging thereto grant the necessary rules, &c. until the affirmance or reversal of the judgment.

Practical Remarks.] *Of the nature and effect of the transcript.—In what cases the record itself is transmitted, or only a transcript thereof.—Of the time for making same.—Of the death of defendant in error after transcript, and before sci. fa. sued out.*

Of the Scire Facias Quare Executionem Non, and of the Non Pros thereon.

The next step defendant's attorney takes, is to compel the plaintiff to *assign errors*, which is done by his suing out a *sci. fa. quare ex. non* engrossed on 2s. 6d. parchment, signed and sealed in usual way. To this plaintiff can answer nothing, but assigning errors. *Sci. fa.* being returned *nihil*, sue out an *alias*; and on *nihil* returned to that, or *sci. feci* returned to *first sci. fa.* give rule for judgment thereon with clerk of rules; it is a *four-day* rule; and having entered your *sci. fa.'s* on roll, sign judgment at expiration thereof. But this is only getting rid of the *superseas*; it does not *non pros* the writ of error, nor does it entitle defendant to *costs* of error. To do which, defendant must further get rule from *master* for plaintiff to assign errors *de recordo*, and serve copy on plaintiff's attorney; it is an eight-day rule, and may be given on draft of *sci. fa.* If errors not assigned within time, enter *sci. fa.'s* on roll of proper term, and writ of error may be *non prosed*. *Non pros* is entered on double 2s. 6d. stamp paper, and on roll of term transcript was made.

☞ A writ of error being *operative* until judgment *affirmed* or writ *non prosed*, it is prudent to *non pros* the writ in all cases. This is sometimes very improperly omitted when the parties agree to stay proceedings on the writ of error, upon plaintiff in error undertaking to pay debt and costs, without the condition of *non prossing* the writ.

Practical Remarks.] *Of the intent and operation of the sci. fa. qua. ex non.—Of its teste and return.—By and against whom it may be sued out.—When to be sued out, and in what manner.—What plaintiff in error can plead thereto.—When it may be dispensed with.*

Of the Assignment of Errors, and Proceedings thereon.

If plaintiff assign errors, they must be either the *common* errors, or *real* errors.

If common Errors assigned.

Defendant may plead *in nullo est erratum*, which is taking issue thereon; then move for a *concilium*, and proceed to judgment.

If

If real Errors assigned.

In case real errors be assigned, more formal proceedings are necessary.

If plaintiff alledge want of *original*, or *warrant of attorney*, or the like (which is termed *allegding diminution*), he, at the same time, prays a *certiorari* to the proper officer, to certify whether there be an *original* filed, &c.

To expedite the return thereof, defendant may get rule of master, and serve copy on plaintiff's attorney "*to return certiorari*," which is a four-day rule. Plaintiff must then get writ made out and returned by *custos brevium*, and left at *clerk of errors*, or filed in *treasury*.

If writ be returned, certifying a *wrong* original, defendant may suggest the *right* original, and pray a *certiorari* on *his* part to have the same certified.

But if *no* return made of first *certiorari*, defendant may plead *in nullo est erratum*, and enter on record a *non misit breve*, which renders the assignment of errors of no avail.

Defendant must *search* for return of plaintiff's *certiorari* at clerk of errors, or clerk of treasury.

How assignment of Errors to be prepared.

Assignment of errors should be delivered to defendant's attorney, engrossed on treble i d. stamp, and signed by counsel. If *real* errors, joinder should be signed also.

How argued.

After errors assigned, plaintiff in error may sue out a *sci. fa. ad audiendum errores*; but this is not now the practice, as defendant generally appears *gratis*; if not, plaintiff may give *rule* for him to appear thereto.

The further proceedings to argument and judgment, are nearly similar to proceedings on *demurrer*. *Concilium* to be moved for, which may be done by either party; *paper-books* to be delivered to judges, and *roll* to be carried in and filed in treasury, and entry thereof docquetted in the usual way, which is afterwards to be brought to master for him to sign final judgment thereon. See *anté*, *Proceedings on Demurrer*, as a guide to these subsequent proceedings in error.

Practical Remarks.] Of *allegding diminution*.—*What it is, and when it can be alledged*.—Of the want of an *original*, or *bill*.—*When and how the deficiency may be supplied*.—*What original shall warrant the proceedings, and the contrary*.—Of the want of a *warrant of attorney*.—*When it shall be fatal, or not*.—Of the *certiorari*, its *teste* and return.—*When a second certiorari may be had*.—Of *assigning errors*.—*Joinder, &c.*—Of the judgment in error.—Of plaintiff's bringing error to reverse his own judgment.

Of Procefs in Error

FROM INFERIOR COURTS.

Procefs in error from inferior courts, is the fame as above, only writ to be allowed by the *prothonotary* of the inferior court, and no diminution permitted to be alledged, except upon error in *Wales* and *counties palatine*.

Of Procefs in Error

FROM *W. B.* INTO EXCHEQUER CHAMBER.

The only material variations between the procefs in error from *W. B.* to *exchequer chamber*, and the procefs in error from *C. B.* to *W. B.* seem to be, that instead of the *sci. fa. qua. exec. non*, to compel plaintiff to assign errors, defendant first gives him a rule to *alledge diminution*; it is an eight-day rule, and got at clerk of errors of *exchequer chamber*; after which, in order to *non pros* writ of error, he serves him with another rule to assign error, which is also an eight-day rule; and instead of a *sci. fa. ad audiendum errores* (which, as it has been observed, is now in a manner out of use in *W. B.*), or any rule, notice must be given to the parties concerned.

Of Error in PARLIAMENT.

Writ of error is obtained of *curfitor*, and is made returnable immediately, if parliament sitting, or at the next parliament, if it be prorogued.

It is allowed by clerk of errors in *W. B.* pay 4l.

Copy of allowance to be served on defendant's attorney.

If *bail* required, put it in with clerk of errors of *W. B.* as before mentioned; *record* and *transcript* to be carried up to house of lords by C. J. of *W. B.* to have same examined; which when done, the *record* itself is brought back.

After transcript carried up, defendant gets peer to *move* for a day for plaintiff to *assign* errors, which is generally eight days from that time. If plaintiff neglect so to do, clerk of parliament issues a *non pros*.

If *diminution* alledged, *certiorari* must be returned within ten days after plea of *diminution* put in.

Plaintiff gets peer to *move* for defendant to appear and argue errors when same are assigned.

When issue joined, a peer moves for a day to *bear errors*, when both parties must attend, and may have two counsel on each side.

Judgment being reversed or affirmed, transcript of record is sent back to *W. B.* with affirmation or reversal, to be entered on record.

A writ of error does not abate by parliament being *prorogued*, but otherwise if *dissolved*.

Of proceeding in Error TAM QUAM.

When *scire facias* has been brought against bail, and execution awarded thereon, after judgment against *principal* in **B. R.** affirmed on error in exchequer chamber, as they cannot have error of the principal judgment, they bring this writ of error *tam in redditione judicii* against the principal *quam in adjudicatione executionis* against the bail, which recites the judgment against the principal, but alledges the error in the *second* judgment, and in the execution thereof, to the damage of the *bail*. Process therein the same as on other writs of error.

Error Coram NOBIS.

Hitherto we have been treating of writs of error brought in a *superior* court for erroneous proceedings in point of *law* in an *inferior* court, in which cases the writ is directed to the chief justice of the inferior court, and is called a writ of error *coram vobis*. But there is also a writ of error *coram nobis*, which is, when error is brought in **B. R.** upon proceedings originally had *there*; this can only be in the King's Bench, which being the court wherein the king is presumed to preside, the writ is stated to be issued on account of erroneous proceedings had before *himself*, *coram nobis*.

This writ also only lies upon errors in matters of *fact*, because then the *judgment* of the court is not impeached. But writ of error for matters of *fact* in **C. B.** must be brought in **B. R.**

The *facts* too must be of a peculiar nature, and appearing upon the face of the record, such as defective process, &c.; for error in the *determination* of facts can only be reversed by an *attaint*, or *new trial*.

How to proceed therein.

Writ is got from *curfitor*; it is allowed by *master*, and a rule is drawn up for that purpose by clerk of rules, making it a *superfedeas*, if plaintiff in error put in and justify bail in four days. If plaintiff neglect to *assign* errors on return of writ, defendant should get rule of *master* for him so to do; when error assigned, if well assigned, defendant may plead thereto, the parties go to issue, and it is to be tried by a *jury*. The record is to be made up as in other cases; either party may carry it down; and if issue be found for plaintiff in error, he must move to have cause put *in paper* for argument, and on producing *postea*, court will give judgment of *reversal*. All the proceedings should be entered on the same roll.

If the error in *fact* assigned, be *not assignable* for error, defendant may join *in nullo est erratum*, which is in nature of a *demurrer*.

Further **Practical Remarks on Writs of Error.**] Of *quashing* and *amending* writs of error.—In *what cases* they abate.—Of *discontinuing* proceedings in error.—Of *summons* and *severance* in error.—Of *amending* judgments, and the original proceedings after error brought.

FALSE JUDGMENT.

In all cases of *error* in the proceedings of courts *not of record*, a writ of *false judgment* lies, in like manner as a writ of error lies on erroneous proceedings in courts of *record*.

It may be sued by any one against whom judgment is given, or by his heir, executor, or administrator; and this although there were other defendants who refuse to join, which cannot be done in *error*.

The Process thereon.

The process is nearly similar to proceedings in error (*which see above*); the writ issues out of chancery, and is got by applying to the proper *curfitor*: on return thereof, the record is to be *certified*, and then plaintiff must *assign* his error. He may also sue his *sci. fa. ad. aud. errores*; or, as is now the usual practice, may *rule* defendant to appear and argue errors. The writ of *false judgment* is a *superfedeas* to all proceedings below. If it abate, or plaintiff be nonsuited, defendant shall have a *sci. fa. quare executionem non*.

The parties being once in court, subsequent proceedings are the same as in *error*.

HABEAS CORPUS.

There are several writs of *habeas corpus*; some used in *criminal* cases, as the *hab. cor. ad. subjiciendum*, and the *hab. cor. ad. deliberand. & recipiend.*; others to charge defendants with *fresh actions* when in *custody*, as the *hab. cor. ad. respondendum*; and others to charge prisoners in *execution*, as the *hab. cor. ad. satisfaciendum*; but the *habeas corpus* more particularly necessary to be treated of here, is the *hab. cor. ad. faciendum et recipiendum*.

This last writ lies only in *civil* cases, where a person is sued and in *gaol* in some *inferior* jurisdiction, and wishes to have the cause determined in some *superior* court. It is usually called an *hab. cor. cum causâ*; is to be had at all times in term or vacation, without any motion in court; and, upon the service thereof, it instantly operates as a *superfedeas* to all proceedings in the court below.

How to sue out Habeas Corpus.

Buy writ at stationer's, ready printed on 5 s. stamp; fill it up, taking care to state the style of the court or person to whom it is to be delivered with accuracy; make *precipe* for office; carry writ and *precipe* to *signer of writs* in *B. R.* and *prothonotary* in *C. B.*; signing in vacation 6 s. 8 d. in term 7 s. 8 d.; then get it *sealed*; pay 7 d.; make it returnable *immediately* before some judge of the proper court: if before the Chief Justice, any other of the judges will turn the prisoner over. Carry it to proper sheriff's office; pay for the different actions with which defendant stands charged there; 9 s. 4 d. for first, and 2 s. 4 d. every other; and, if in the country, sheriff's fees and expences for bringing prisoner to town. Sheriff having returned writ, by sending officer with prisoner

prisoner to a judge's chambers, get *tipstaff* to carry him over to the prison to which he is to be removed. Fees, judge's clerk 8s. 6d, officer and *tipstaff* 10s. 6d. each.

Of Bail to Habeas Corpus.

In all cases where a cause is removed from an *inferior* court, special bail is now required by 19 Geo. III. c. 70.

To compel defendant to put in bail, let plaintiff's attorney get a *rule* from judge for that purpose; so if bail put in be not *good* bail, instead of entering exception, apply to judge for a *rule* for defendant to put in *better* bail, which must be within 28 days after bail first put in.

Of Declaring, Pleading, &c.

Plaintiff should declare within *two* terms after return of *hab. cor.* the term in which it is returnable being one, or defendant need not plead thereto; and as the record itself is not removed, he must declare *de novo*. Declaration may be delivered in *chief*, or *de bene esse*; and defendant, according to such delivery, is to plead in same time, and subsequent proceedings are carried on in same way, as in common cases.

Of the Procedendo.

If defendant do not put in bail, justify bail, plead, &c. in *due time*, plaintiff may sue out a *procedendo*, which is a writ grantable by any judge of the court into which cause is removed, remanding all the causes back to the *inferior* court in same manner as *habeas corpus* removed them to the *superior*.

It is engrossed on a 2s. stamp parchment, and to be signed and sealed in the usual way.

Such are the proceedings by *habeas corpus* to remove defendant into the king's bench, in *all cases* where he is in custody in an *inferior* jurisdiction, or on process out of *B. R.*; but if he be in custody on process from *C. B.* only, and there be no action actually against him in *B. R.* in order to be removed to the *B. R.* prison, he must first procure some creditor to swear to a debt against him of 10l. or upwards in *B. R.* upon which a writ must be sued out in usual way, and left at the sheriff's office. Then pursue the above directions.

Practical Remarks.] Of the nature and effect of the different kinds of *habeas corpus*.—The *habeas corpus ad. fac. et recip.* more particularly considered.—Of the different statutes relating thereto.—At what time to be granted.—To what places it lies.—Of the return of the writ.—Of bail to *hab. cor.* and of the 19 Geo. III. c. 70.—Of declaring.—Of pleading, and of the subsequent proceedings.—Of the *procedendo*.

OF OUTLAWRY.

Outlawry may be either upon *mesne* process, or on *ca. sa.* after judgment.

It

It is the first kind of outlawry which is here treated of, it being merely considered as process to compel an *appearance* of the party against whom a suit is commenced.

And this, either when there is only *one* defendant who does not appear, and who cannot be found to be served with process, or arrested thereon; or when there are *more* defendants, and *one* of them does not appear, nor can be found, in which case *outlawry* must go against *him* before plaintiff can declare against the others who *have* appeared.

Process of outlawry lies only on a *special original*; not on bill, nor on common *capias* with *ac etiam*.

Practical Remarks.] *Of the nature and effect of outlawry.—In what cases it lies.—Against whom it may be awarded.—Whether against peers.—Infants.—Feme sole or covert.—Of outlawry where there are several defendants.*

Of the Process.

Draw up *precipe* for *special original*; carry it to curfitor of proper county, who will make out original writ; or in **B. R.** to filazer, who will get the original of curfitor. If carried before the *essoin* day of term, original may be made *returnable* of the term preceding. Sue out *capias*, *alias*, and *pluries*; let there be 15 days between the *teste* and return of each. They may be taken out at once, and returned *non est inventus*. Carry *pluries* to filazer in **B. R.** who is also the *exigenter*, and in **C. B.** to *exigenter*. Process of outlawry then begins by the *exigi facias* and writ of *proclamation* being made out. The *exigi facias* is to order sheriff, at five successive county courts, to *exact* or demand defendant to appear. This is done in the county where the action is laid, which is generally *London*, the *hustings* there (which are the *county courts*) being held once a fortnight. The writ of *proclamation* orders sheriff to proclaim defendant three times in some notorious place in the county or neighbourhood where defendant *lives*; so that this writ must always be directed to such sheriff, though the *exigi facias* may have been directed to another. The last of the *proclamations* must be made one month at least before the *fifth exactiō*. If defendant does not appear upon being *quinto exactus*, he is returned *outlawed*.

It sometimes happens that there are not *five* county courts, or *hustings*, between the *teste* and return of *exigi fac.* in which case, when you fetch it from the compt. or sheriff's office, and do not find *five exactiōs* returned thereon, carry it again to filazer or *exigenter*, who will make out *allocatus* until the five exactiōs are complete. They must be five successive county courts; for if any intervene without an *exactiō* being made, a new *exigi fac.* must issue.

Practical Remarks.] *Of the special original whereon to ground the outlawry. Of the affidavit of the debt, and whether it is necessary to be made or not.—Of the capias, alias, and pluries, their testes and returns.—Of the nature and effect of the exigi facias, its teste and return.—Of filing warrant of attorney, and the necessity thereof.—Of the exactiōs and proclamations; how to be made by sheriff, and where.—Of the returning the exigent, and writ of proclamation.*

Of obtaining Satisfaction from the Outlaw's Chattels and Lands.

Defendant being returned *outlawed*, the filazer in **B. R.** and the clerk of. outlawries in **C. B.** with whom the *exigent* is filed, will make out a *capias utlagatum*, either *general* or *special*, i. e. against defendant's body only, or against his body, goods, or lands, wheresoever they may be. Upon this writ sheriff may extend and appraise defendant's goods by an *inquest*, plaintiff paying charges of inquisition. Inquisition being taken, *cap. utlag.* should be returned, and in **B. R.** carried to filazer, in **C. B.** to clerk of outlawries, who will *transcribe* same, and transmit it into court of exchequer. Then apply to clerk in *remembrancer's* office for a *venditioni exponas*, by virtue whereof sheriff may *sell* the goods. If the amount of such sale be above 50*l.* apply by *petition* to lords of the treasury for the money levied to be paid to you by sheriff in satisfaction of debt and costs. This petition will be referred to the solicitor of the treasury who will examine into the nature of your demand, and make his report accordingly; whereupon he will procure a *warrant* from the treasury to the attorney-general for him to consent to such payment being made on motion in court. A brief, with two guineas, is given him for that purpose; and also a brief to counsel to move in court of exchequer accordingly. An *order* is then made to sheriff, engrossed and sealed with a *subpœna* annexed, and in case of his disobedience an *attachment* will be granted. Fees and expences about 20*l.*

In same manner the profits or *issues* of defendant's lands may be levied by a *levari facias*, and afterwards sold by *vendit. exponas*, and paid to plaintiff upon petition as above: but if defendant has a *freehold* interest in lands unincumbered, it is sometimes usual for plaintiff to petition lords of treasury to grant a lease thereof to him.

Practical Remarks.] Of the nature and extent of the remedy of having satisfaction from outlaws goods or lands.—Of the proceedings of the sheriff in making inquisition, and in the taking of the issues.—What shall be accounted issues.—Of getting the issues applied to plaintiff's use.—Of the writ of *melius inquirendum*, in case of a defective return of inquisition.

Of superseding the Exigent before Outlawry.

If defendant would avoid the outlawry after an *exigent* sued out against him, he must find out to what sheriff writ is directed, and get a note of it, mentioning at whose suit, the nature of the action, and when *exigent* is returnable; from which note filazer in **B. R.** or *exigenter* in **C. B.** will make out a *superfedeas* on defendant's attorney entering appearance, if action not *bailable*; which *superfedeas* must be carried to sheriff for his allowance thereof before the return of the *exigent*. It is a writ setting forth the *exigi fac.* having issued, &c. and ordering sheriff to forbear further proceedings, defendant having duly appeared in court before issuing thereof, and offered to answer plaintiff, though perhaps the fact may be otherwise. The fees are about 10*s.*; but if the action be *bailable*, you must put in and justify bail in usual way before *superfedeas* will be granted.

Practical

Practical Remarks.] *Of the old practice respecting bail on defendant's appearing upon the exigent, and of the alteration therein.—Of the nature and operation of the supersedeas.—Of the advantages to defendant of coming in upon the exigent.*

Of being taken upon or appearing to the Capias Utlagatum.

Upon an arrest on *cap. utlag.* if the action be *bailable*, bail-bond must be given to sheriff for defendant's appearance, and then he may be discharged: if *not bailable*, he shall be discharged on his attorney entering common appearance, and the outlawry shall be reversed: in the *first* case, by motion in court; in the *last*, by a judge's order.

Practical Remarks.] *Of the ancient practice respecting bail upon an arrest on the cap. utlag.—Of the alteration therein by statute 4 & 5 W. & M. c. 18.—Of the nature of the recognizance of such bail.*

Of reversing the Outlawry.

The intent of the process being only to compel an *appearance*, whenever this intent is answered, either by defendant's *voluntary* appearance, or by his being *arrested*, although it may not happen until after the awarding of the *cap. utlag.* the court will, generally, upon *motion* (bail, if requisite, having been first put in and justified, or the debt and costs satisfied), *reverse* the outlawry, on payment of *costs of outlawry*: but it may happen, that defendant is put to his writ of error to reverse outlawry.

Practical Remarks.] *In what cases, and upon what terms, court will reverse outlawry on motion: 1. When defendant comes in upon the exigent: 2. When he appears or is arrested on cap. utlag.—In what cases outlawry may be reversed by writ of error: 1. On defendant's appearance on exigent: 2. Upon the arrest or appearance of defendant on cap. utlag.*

Of declaring after Outlawry reversed.

Upon reversal of outlawry, plaintiff begins *de novo*; he must sue out *new original*, and proceed as in other cases; but this new action must be commenced *within a year* after outlawry reversed by 21 Jac. II. c. 16. Declaration need not have the same *venue* as in former *original*.

Practical Remarks.] *Of the putting in of bail, and the nature of their recognizance on reversal of outlawry, and herein of 31 Eliz. c. 3.—Of the restoration of the outlaw's goods, &c. after outlawry reversed or determined.*

PARTITION.

A writ of *partition* is the remedy which *coparceners*, *joint-tenants*, or *tenants in common*, have to compel each other to divide the lands so jointly held, in order to hold the same in *severalty*.

Coparceners were always compellable to make *partition* at common law; but *joint-tenants*, and *tenants in common*, were not so, until the stat. 31 Hen. VIII. c. 1. and 32 Hen. VIII. c. 32.

The proceedings on the writ of partition are now regulated by the 8 and 9 Will. III. c. 31. made perpetual by 3 and 4 Anne c. 18. and are as follows :

Of the Process.

Sue out an original writ, to be had of the *curfitor* ; upon which the sheriff summons the tenants.

If they do not appear on the *quarto die post* of return of writ of partition, get affidavit of the service of the writ to be made by the sheriff's officers who served same ; after which sue out a *pone* or *attachment* ; serve it in same manner as writ of partition.

It should be tested on the *quarto die post* of the return of writ of partition, having 15 days between *teste* and *return*. There must also be 40 days between service of writ of partition and return of *pone* or *attachment*.

Of Tenant's not appearing, and of Judgment by Default.

If tenant do not within 15 days after return of writ of *pone* or *attachment* cause an appearance to be entered in the court where writ was returnable, demandant may enter his declaration, and the court will proceed to examine demandant's title and quantity of his *part* and *purpart* ; and accordingly as they shall find his *right part* and *purpart* to be, they will for so much give judgment by default, and award a writ to make partition, whereby such proportion, part and purpart, shall be set out severally ; which writ being executed (after eight days notice to the occupier or tenant of the premises) and returned, final judgment shall be thereupon entered, and all persons shall be concluded thereby.

Of the Tenant's Appearance.

If tenant appear, demandant declares ; to the declaration tenant pleads ; and the parties, being at issue, proceed to trial as in other cases.

By stat. 8 and 9 W. III. c. 31. there can be no plea in *abatement* to the declaration.

And indeed the only plea in *bar* seems to be *non tenent insimul*, every other being tantamount thereto.

The party may confess the action, and consent that partition may be made.

Of Judgment in Partition.

There are two judgments after confession of the action, or verdict for demandant : the first judgment is, *quod partitio fiat*, upon which a writ *de partitione facienda* goes to the sheriff for him to make partition : this being done, either by sheriff or under-sheriff, according to statute of William, sheriff makes his return accordingly. Then, upon the return of the writ *de partitione facienda*, final judgment is entered *quod partitio firma et stabilis in perpetuum teneatur*.

Partition is a *real* action, and no damages are recovered.

PROHIBITION.

PROHIBITION.

What it is, and whence it issues.

Prohibition is a writ forbidding an *inferior* court to proceed in any cause depending there, on *suggestion* that the cognizance thereof belongeth not to them.

The court of *B. B.* being the *superior* common law court, hath an unquestionable power of awarding *prohibitions*.

So may the court of *chancery*, the writ being made returnable into *B. B.* or *C. B.*

So now may the Common Pleas by a *suggestion* upon record, not otherwise.

Of moving for a Prohibition, and of the Suggestion.

When you intend to move for *prohibition*, first prepare *suggestion*, which is a statement of the proceedings in the *inferior* court, and *suggesting* the ground of the application for a prohibition. To do this, copies of the proceedings *below* must be had, and also an *affidavit* that they are true copies. *Suggestion* should be entered on the roll, and a copy on treble 1d. stamp paper be left with *clerk of papers* in *B. B.*; but in *C. B.* no copy is made. Prepare *brief*, reciting therein *suggestion* and *affidavit*, for counsel to move: if rule obtained, draw it up in *B. B.* with *clerk of rules*; in *C. B.* with *secondary*.

Upon shewing cause, if it appear to the court that the surmise is not true, or that there are not good grounds for granting *prohibition*, it will be denied: if the matter be doubtful, they will order the party to *declare*.

Of the Writ of Consultation.

If after a prohibition granted, either the matter in issue be found for defendant, or any other sufficient cause appear why such *prohibition* should not have been allowed, the court grants a *consultation*, which is a writ in the nature of a *procedendo*, authorising the inferior court to proceed in the cause, notwithstanding such *prohibition*.

Practical Remarks.] *Of the nature and effect of prohibition.—Whence it issues.—Of the difference in the courts of B. B. and C. B. in awarding prohibition.—In what cases it will be granted, and whether granting it be discretionary or not.—Of the suggestion.—Of proving the suggestion, and herein of the stat. 2 and 3 Edw. VI. c. 13.—In what cases it ought to be proved, and at what time.—What proof is necessary.—Of entering the proof of suggestion on record.—In what cases suggestion must be verified by affidavit.—Of the extent of the prohibition granted, whether absolutely, or hoc usque until a particular act is done.—Of declaring in prohibition.—Of the costs in prohibition, and herein of 8 and 9 Will. III. c. 10.—Of disobedience to the writ of prohibition.—Of the consultation.—Its nature and operation.—When granted.—Of granting prohibition after consultation awarded.*

QUARE IMPEDIT.

A *quare impedit* is a *possessory* action, and the only one now in use in case of any disturbance of *patronage* to a church or *ecclesiastical benefice*. It is equally remedial whether a man claims title by *descent* or *purchase*.

It can only be brought in *C. B.* except by the king.

Of the Process.

Get original writ of *curfitor*; carry it to proper sheriff's office; sheriff must cause defendants to be *summoned* by good summoners, and return their names upon the original. The *summons* is to be served on tenant or at church-door. If defendant neither *appears* on *quarto die post* of return of writ, nor *essoins*, proceed to compel an appearance by *attachment* and *distringas*. On default of appearance, or casting an *essoins*, upon return of first *distringas*, by *statute of Marlborough* judgment shall be for plaintiff, and a writ issue to the bishop.

Of the Writ of Ne Admittas.

If plaintiff suspect that the bishop will admit defendant's clerk pending the suit, immediately after suing out *quare impedit*, sue out also a *ne admittas*, which is a prohibitory writ commanding bishop not to admit any one till suit be determined.

Of declaring, &c.

If defendants *appear*, plaintiff declares, to which they may plead in *abatement* or *bar*, and go on to issue or demurrer and trial as in other cases: but the *pleadings* in this action, and the rules concerning them, are both difficult and intricate.

Of the Judgment.

The judgment for plaintiff, if the right be found in him, and he has commenced his action in due time, is, to *recover his presentation*; for the effecting of which the writ *ad admittendum clericum* issues, directed to the bishop, ordering him to admit a fit person at the *presentation of the plaintiff*.

Practical Remarks.] Of the nature and effect of the *quare impedit*.—Of the time when the action ought to be brought.—Of the parties to the suit.—Of the *teste* and return of *quare impedit*.—Of judgment by default, and herein of the *statute of Marlborough*.—Of the four points to be inquired into before final judgment.—Of the writ of inquiry for that purpose.—Of the writ of *ne admittas*.—Of the appearance of defendants.—Of declaring in *quare impedit*.—Of pleading therein.—Of the *verdict*, and what ought to be found by the jury upon the trial.—Of the judgment, and of the writ of *admittendum clericum*.

QUI TAM ACTIONS.

Where the statute gives a penalty, *half* to the king, or to the poor of the parish, and *half* to the person who sues, it is called a *qui tam* action, because plaintiff prosecutes *as well for the king, or the poor of the parish, as for himself, qui tam pro domino rege quam pro seipso*; but where the *whole* of the penalty goes to the person suing, it is more properly a *popular* action; though *both* may be called *popular*.

The proceedings in a *qui tam* action are the same as in other cases, excepting that in a common suit plaintiff and defendant may compromise in any manner they please; whereas *qui tam* actions, by statute 18 Eliz. c. 5. cannot be compounded without leave of the court on pain of the pillory, and 10l. forfeiture.

Leave to compound is to be obtained upon *motion*, for which purpose draw up an *affidavit* of the state of the facts, the amount of the penalty, and the *terms* upon which the parties have agreed to *compound*: give it to counsel to move, and also brief to consent to motion on the payment of the sum agreed. Of this *composition* the king must have *his moiety* immediately paid to the master of the crown-office. Rule to compound is then drawn up by clerk of rules in **B. B.** or secondary in **C. B.**

Where a person is conscious of having offended against any penal statute, and is apprehensive of being sued for the *penalty*, it is not unusual for him to procure some *friend* to commence a suit against him, in order to forestall other actions; but to prevent in a great measure this practice, the statute of 4 Henry VII. c. 20. enacts, that no recovery, otherwise than by *verdict*, obtained by *collusion*, in an action *popular*, shall be a bar to any other action prosecuted *bonâ fide*: so that a judgment on *verdict* must be obtained to render such *amicable* suit *effectual*.

REPLEVIN.

What it is.

Whenever a person *distrained* upon, wishes to regain possession of the things *distrained*, i. e. to *replevy* them, upon application to the proper sheriff of the county, his goods will be restored, provided he first give *security* that he will *prosecute his suit* (i. e. his action of *replevin*, in order to try the legality of the distress); and also, that he will *redeliver the goods distrained*, if judgment be against him.

Replevin is therefore a remedy grounded upon a *distress*.

Practical Remarks.] *Who may replevy.*—*What property ought to be had in the things distrained.*—*When goods cannot be replevied.*—*Of claiming property at the time of making replevin, and of the writ de proprietate probanda.*

Of the Nature of a Distress.

At common law, in *all* cases, a distress, when made, was *held* merely as a *pledge*; the things *distrained* could neither be sold nor disposed of.

But now by *stat. 2 W. & M. c. 5.* in *all* cases where the distress is for *rent* (but not otherwise), the landlord distraining may, after a certain

tain time, and under certain restrictions, *sell* the goods distrained, and satisfy himself his demand.

There are also other statutes beneficial to landlords respecting proceedings in *replevin*, grounded on distresses for *rent*. In treating of this subject, therefore, it should be considered whether the distress be for *rent*, or not.

How to make a Distress for RENT, and to sell the same under 2 W. & M.

The landlord himself, or any other person as his bailiff by an authority from him in writing, may make the distress. It is done by seizing any article of goods in the name of the whole, as a distress for the rent due.

After which make an *inventory* of such quantity of the goods as you think sufficient to cover the demand; give tenant a copy thereof, and also a *written notice* of the distress being made, and for what cause; and that if the goods be not *replevied* within five days, they will be appraised and sold.

The goods may be removed from the premises, giving notice to tenant of the place to which they are removed; but the common way is to put a man in possession.

If no tenant or other person on premises leave the notices there.

At the end of the five days allowed by the statute (which are *exclusive* of the day of notice of distress given), search at sheriff's office whether goods are *replevied*; if not, and tenant on demand refuse to pay the rent, and charges of distress, get a *constable*, and *two sworn appraisers*; the latter are to appraise the goods upon oath, which the *constable* is authorised to administer. An *inventory*, with the appraisement, is to be signed by the *appraisers*, and there should be indorsed thereon a memorandum, signed by the *constable*, of his having duly administered the oath; and another memorandum signed by the appraisers, of its being their appraisement upon oath. All of which should be transacted before witnesses, as it may be necessary hereafter to prove the regularity of the proceedings.

The goods being appraised, as above, *sell* them either to the appraisers themselves, or any other persons, for the best price you can. Out of the proceeds, deduct your rent and reasonable charges of distress, and pay *surplus* to the tenant.

Formerly the least *irregularity* in the above proceedings would make the parties trespassers *ab initio*; but now, by statute 11 G. II. c. 19. it is otherwise, and the party aggrieved shall only have his action of trespass, or on the case, *for the special damage sustained* by reason of such *irregularity*.

Practical Remarks.] *Who may distrain.*—For what causes distress may be made.—What goods were liable to be distrained at common law.—What have been rendered so by statutes.—Of the interest the distrainer has in the goods.—Of impounding cattle distrained.—Of the statute 2 W. & M. in case of distress for rent.

When to make Replevin.

If distress were for *rent*, replevin must be made within five days after notice of such distress as above mentioned.

If distress were *not* for rent, there is no fixed time, the goods distrained remaining as at common law a mere *pledge* in the hands of the distrainer.

How to make Replevin.

Go to sheriff's office, carry with you two *responsible* sureties, enter into replevin bond conditioned for prosecuting suit and returning goods as above mentioned, and replevin will be made.

Practical Remarks.] *Of the mode of making replevin at common law.—Of the alteration therein by the stat. of Marl. —Of the further improvements by 11 G. II.—Of the stat. 1 & 2 P. & M. c. 12.—Of the conduct and power of the sheriff in searching for the cattle or goods to make replevin.*

Of the Action of Replevin.

The usual way of commencing the suit, is by *plaint* in the sheriff's court; but it may be by *writ of replevin* there, or in **B. R.** or **C. B.**

Though distress be for above 40s. the cause may be determined in the inferior court.

Practical Remarks.] *Of the kinds of action in replevin.—In the detinet, and in the detinuit.—Of the court in which the action may be brought.—How it lies in county court by writ and by plaint.—Of the writ of replevin, and of the capias in withernam.—Of proceedings by plaint, and in what cases sheriff's authority is limited.*

Of the Assignment of the Replevin Bond.

If the distress be for *rent*, but not otherwise, sheriff, at the request and costs of the avowant, must *assign* the replevin bond to him, who may afterwards sue the sureties thereon in his own name, provided the plaintiff do not prosecute his suit agreeable thereto. *Stat. 11 G. II. c. 19.*

It may be assigned in *four days exclusive* after the time limited therein for plaintiff to prosecute his suit. The mode of assigning and proceeding on replevin bond, is the same as on *bail bond*, which see ante, p. 16.

Of Removing the Suit from County Court into B. R. or C. B.

Either party wishing the cause to be determined in a superior court, may remove it thither, ~~which is done~~, if proceeding below by *plaint*, by *recordari facias loquelam*, vulgarly called a *refalo*.

Make *precipe* for *curitor* of the proper county, who will prepare the writ, carry it to under-sheriff. It is returned of course.

If sheriff return *tardè*, sue out an *alias*.

Of compelling the adverse Party to proceed, when Suit is removed.

1st, *If removed by Plaintiff.*

On return of *refalo*, file *refalo*, *plaint*, &c. with *filazer*, search for defendant's appearance; if none to be found, give him a *rule to appear*; upon

upon non-appearance thereto, sue out a *pone*, and after that a *distingas ad infinitum* until he does appear, then declare.

2d, If removed by Defendant.

File *resalo* and return with *filaxer*, and enter an *appearance*, then give rule for plaintiff to declare; and for want of declaration, when rule expires, sign judgment of *non pros*, if for rent, according to 17 Car. II. which see *infra*; if not for rent, in order to ground thereon a *return. habend.* as at common law.

Practical Remarks.] From what, and into what courts replevin suits may be removed.—Of the time and manner of removing them.—Who may remove them.—Of the different writs for that purpose,—the *pone*,—the *resalo*,—the *certiorari*.—When to be respectively used.—What to be done by the party removing the suit.—How defendant is to proceed if cause be removed by plaintiff, and *resalo* not filed,—and herein of the writ of *procedendo*.—Of signing *non pros* for not declaring.—Of plaintiff proceeding in his suit after judgment of *non pros*.—Of the writ of second deliverance.

Of the Declaration, and other Proceedings in Superior Court.

Resalo being returned, and *appearance* of defendant entered, plaintiff must declare *de novo*, nor need any notice be taken of the former proceedings; to which declaration, defendant may *plead* in abatement or in bar, or may *avow*, or make *conusance*, i. e. justify the taking in his own right, or as bailiff in the right of another, and the parties go on to issue or demurrer, which is tried or argued in the usual way, only both parties being *actors* in replevin, either of them may take down the record to trial.

Practical Remarks.] Of the particularities requisite in the declaration in replevin.—Of the pleas in abatement and in bar.—Of the suggestion in nature of an *avowry* in case of pleading *prisal in auter lieu*, and herein of stat. 21 H. VIII. c. 19.—Of the *avowries* and *conusance*.—Of making up issue in replevin, and carrying down record to trial.

Of Judgment and Execution in Replevin.

1st, If Judgment be for Defendant, and the Distress was for RENT.

If plaintiff suffer himself to be *non prossed* at any stage of the suit after the cause has been once removed, defendant may sign a *non pros*, and enter up judgment *pro return. habend.*; after which, by 17 Car. II. c. 7. upon his making a suggestion in nature of an *avowry* or *cognizance* for such rent, to ascertain the court of the cause of distress, the court, upon his prayer, shall award a writ of inquiry, directing the sheriff to inquire into the sum in arrear at the time of the distress taken, and the value of the goods distrained. Upon return of the inquisition, *avowant* shall have judgment for the arrears of such rent, if the things distrained be of that value, if not to the amount of the value thereof, together with his full costs of suit, for which execution is to go in the common way.

If plaintiff be *non-suited* at the trial, or has a *verdict* against him, then the jury at the trial shall inquire as above, and avowant have judgment in the same way.

So if judgment on *demurrer* be for avowant, the same remedy is given as first above mentioned.

2d, If Judgment be for Defendant, but Distress NOT for Rent.

In all other cases, except of distresses for rent, judgment for defendant is at common law, *pro return. habend.* and also his damages sustained; which damages, if judgment be on *non pros* or *demurrer*, are to be ascertained by a *writ of inquiry*; but if judgment be after *verdict*, or on a *non-suit* upon trial, are to be assessed by the jury on the trial.

✎ In all cases where the things distrained are not to the value of the rent, you may distrain again for the deficiency.

3d, If Judgment for Plaintiff.

The plaintiff having already the possession of the goods distrained, the judgment can only be for his damages sustained, which are to be assessed by jury on *writ of inquiry* in case of judgment of *non pros*, or on *demurrer*, and by the jury on the trial, if judgment be after *verdict*, or on a *non-suit* at trial.

Practical Remarks.] *Of the construction and extent of statute 17 Car. II.—How to proceed if jury omit to inquire of the value of rent in arrear.—Of the judgment and execution in cases not within that statute.*

Of the Remedy of the Defendant, in case no Return of the Goods be made by Plaintiff after Judgment on the Writ of Return. Habend.

If after judgment and *return. habend.* sued out, whether judgment by default or not, an *esloiment (elongata)* should be returned, and the plaintiff should not satisfy judgment, avowant may proceed against the sureties, if distress were for rent on the replevin bond according to 11 G. II. c. 19. as above mentioned; but if not for rent, or if he prefer the common law remedy, and takes no assignment of the bond, by *scire facias* against the sureties, and if they be insufficient, and a *nihil* returned to the *sci. fa.* then by *sci. fa.* against the sheriff, or by an action upon the case against him for taking insufficient sureties, for the sheriff, undersheriff, and replevin clerk, are all answerable to the defendant for the pledges.

In order to proceed against the sureties, apply to replevin clerk for their names, which if he refuse to give, court on motion will grant a rule to compel him to discover them.

Practical Remarks.] *Of the common law remedy in such case, and herein of the proceedings against the sureties and the sheriff.—Of the action against sheriff for taking insufficient pledges.—And of the remedy given by 11 G. II. c. 19.*

RIGHT—Writ of.

The writ of right is the highest writ in the law. It only lies of an estate in fee simple, and is used either when no possessory action can be brought

brought on account of the statute of limitations having attached, or when such action has been brought and judgment given against demandant.

Even this remedy must be prosecuted within *sixty years* of the *seisin* of the person under or through whom demandant claims; for after sixty years uninterrupted possession, no title is suffered to be impeached.

Of the Process.

Get writ of *curfitor*, upon which sheriff must cause the tenant to be summoned by good summoners, which must be by personal service, or on the land, and proclamation must be made at the most usual door of the parish church where lands lie. Sheriff must make return of writ, indorsing thereon the names of the *summoners*, and the day he made proclamation. Upon default of tenant in not appearing or *essoining* on return of writ, a *grand cape* issues, commanding sheriff to seize the lands demanded. Tenant may, on return thereof, come in and save his default, which is generally the case. Demandant then declares,—tenant pleads;—if the general issue, he does not conclude to the country in the usual way, but he puts himself upon the *grand assize*, praying a recognition to be made, whether the greater title be in him or in demandant. Upon the issue or *mise*, as it is called, being so joined between the parties, a writ or *summons* is directed to sheriff, commanding him to summon *four knights girt with swords* to be before the justices at Westminster on return of writ, to make election of the *grand assize* between demandant and tenant. If sheriff make no return thereof, an *alias writ of summons* issues, which is returned with the names of the *four knights summoned*. Upon the return thereof, the four knights appear in court, and being placed in the jury-box, are severally sworn lawfully and truly, to choose *twelve knights girt with swords*, of themselves and others, which best know and will declare or say the truth between the parties. The four knights having chosen of themselves and others twenty-four, a writ of *venire facias* then issues, commanding the sheriff to cause to come before the justices of

¶ C. 15. the four knights, and the other persons named by them, *recognitors chosen to make recognition of the grand assize* between the demandant and tenant. Upon the day of trial, the *recognitors* appear, or best part of them, who are sworn, and try the matter of right between the parties. If they give a verdict for demandant, he has judgment to recover his *seisin* against the tenant, to hold to him and his heirs quit of the said tenant and his heirs for ever.

☞ There is much reading in the books respecting the process on writs of right, which appears not a little difficult and intricate; but the above short account thereof, chiefly taken from the proceedings in the late case of Tyssen and Clark, reported in Wilson, may be sufficient to answer our present purpose.

SCIRE FACIAS.

A *scire facias* is a *personal action*.

But it may more properly be defined, a *judicial writ*, in the nature of an original. Judicial, inasmuch as it is founded on a judgment, or

other matter of record; and in the nature of an original, since similar proceedings may be had thereon, as in common actions.

This writ lies for a variety of purposes, but it is most generally used either to compel bail, whose recognizance is forfeited, to satisfy the judgment obtained against their principal; or to revive a judgment after the time for taking out execution thereon is elapsed, or one of the parties to the suit is dead.

We have already considered *Proceedings against Bail*, ante, p. 54. it only remains to shew the mode of reviving judgments by *sci. fa.*

Practical Remarks.] *Of the nature of the scire facias, and in what cases it is the proper remedy.*

Of the Scire Facias to revive a Judgment.

There are three cases in which it may be necessary to revive the judgment by *sci. fa.*

1st, *Where the Parties to the Suit are still LIVING, but the Time allowed for taking out Execution is elapsed.*

In all actions whatsoever, if execution be not sued out within a year and a day from the day of signing final judgment, or in the case of writs of error, or injunctions, from the time such impediment is removed, judgment must be revived by *sci. fa.*

But the judgment may be kept alive by *ca. fa.* or *fi. fa.* being issued out within the year, and returned, filed, and entered upon the roll, though no execution actually made, as it may afterwards be continued to the time of making execution.

Sci. fa. must be brought in the same county where original action commenced.

Practical Remarks.] *In what cases a sci. fa. to revive a judgment lay at common law.—How the remedy was extended by stat. West. 2. 13 Ed. I.—Of the time allowed after judgment to sue out execution,—or after interlocutory judgment to execute inquiry.—Of executions as to writs of error, injunctions, cesset executio, &c.—Whether an execution is void, or only voidable if sued out without a sci. fa.—When a sci. fa. cannot be sued out without motion.—Of the sci. fa. where there are several defendants.—Of the sci. fa. in case of the bankruptcy of the party.—In what county sci. fa. should be brought.—Of entering and continuing execution on the roll.*

Of the Intent of the Scire Facias to revive a Judgment.

The intent of the *scire facias* is to give the party against whom execution is about to be issued, notice or warning thereof, that he may not, after a judgment has been dormant for a length of time, be taken by surprise; and also, that he may have an opportunity of shewing cause why such execution should not be awarded. But by the general practice this intent is defeated, for it seems to be in the plaintiff's power to cause the defendant to be summoned, or not, as he thinks fit; and indeed the most usual way is, to revive the judgment by *sci. fa.* without giving the party any notice,

of

Of the Process thereon.

1st, If Defendant is to be summoned.

Ingross *sci. fa.* on 2s. 6d. stamp parchment; get it signed by signer of writs, pay 1s. 8d.; sealing 7d.; carry it to sheriff's office for *avarant* or *summons* thereon, pay 2s. 4d.; leave writ and summons at the sheriff's office.

If proceedings were by *bill* in **B. B.** *sci. fa.* must have eight days between *teste* and return if by *original*, whether in **B. B.** or **C. B.** fifteen days.

It must be left at sheriff's office *four* days before the *return-day* thereof; on the *return-day* call for it there, and it will be returned *scire feci*; then proceed as directed hereafter.

2d, If Defendant is not be summoned.

Sue out *sci. fa.* as before, and leave it at sheriff's office, only get *no* warrant or summons thereon.

B. B.

If left at sheriff's office *one* day before the return, it is sufficient; upon its being returned *nihil*, sue out an *alias sci. fa.* *tested* the return of the first, the *alias* ought to be left in the office *four* days *exclusive* before return thereof; fifteen days *inclusive* between the *teste* of first *sci. fa.* and return of *alias* is good.

C. B.

It should be left at sheriff's office *four* days *exclusive* before return thereof, and there should be fifteen days between *teste* and return; upon which account, in this case, one *sci. fa.* and *nihil* returned is equal to two in **B. B.** so that upon the *sci. fa.* being returned *nihil*, you need sue out *no alias*; but not so where judgment is revived by or against *representatives* of the party.

N. B. The sheriff is to indorse on the writs the day on which the same are left at the office.

Of the Judgment on *Sci. Fa.* if no Appearance.

Having got a *scire feci* returned, if defendant was to be summoned, or if *not*, after the *sci. fa.* and *alias*, with *two nibils* in **B. B.** or in **C. B.** the *sci. fa.* with one *nihil* are returned; give rule for judgment with clerk of rules, it is a *four-day* rule *exclusive*, pay 1s. 10d. No service thereof necessary. At the expiration of which rule, if no appearance, enter your *sci. fas.* on a roll of the term of the *first sci. fa.* get it marked by clerk of judgments, and docquet same, then sue out execution.

Of the Appearance of Defendant, and the subsequent Proceedings.

If defendant appear on the *sci. fa.* such appearance is effected

B. B.

By defendant's attorney giving plaintiff's attorney notice on a slip of paper, that he appears for defendant upon the *sci. fa.*

C. B.

By entering appearance on a slip of paper at *prothonotary's*.

After

After which plaintiff *declares* (declaration to be ingrossed on treble 1 d. paper, charge 8 d. per folio); to which defendant *pleads*, &c. and the subsequent proceedings are carried on in the usual way.

N. B. Plaintiff's attorney, not the clerk of the papers, makes up issue or paper-book on proceedings by *sci. fa.*

Practical Remarks.] *Of the time of leaving sci. fa. in sheriff's office.—Of the teste and return of sci. fa.—Of summoning defendant thereon.—Of the nature and extent of the judgment on sci. fa. by default.—Of the declaration on sci. fa.—Of pleading thereto, and herein what pleas are allowed.—Of the costs on sci. fa.*

Another case, in which it may be necessary to revive the judgment, is
2d, *Where one of the Parties, Plaintiff or Defendant, DIES AFTER Verdict or interlocutory Judgment, and BEFORE final Judgment.*

At common law, the suit *abated* in such case; but it is now otherwise by the statutes 17 Car. II. c. 8. and 8 & 9 W. III. c. 11.

The mode of proceeding by *sci. fa.* to revive judgments by or against the *representative* of the party, is nearly the same as above mentioned; only, if it be upon an *interlocutory judgment*, the intent of the *sci. fa.* is for the party to shew cause why damages should not be *assessed upon writ of inquiry*; so that when judgment is obtained on the *sci. fa.* in manner before shewn by no appearance of defendant thereto, you must give notice of writ of inquiry, and proceed in the usual way to final judgment; after which, enter on the *sci. fa.* roll the award of inquiry, inquisition, and final judgment.

Also in C. B. in all cases of *sci. fa.*'s by or against *executors or administrators*, one *nihil* is not sufficient, but proceed exactly in the same way as in B. B. getting *two nibils* to the *sci. fa.* and *alias*, or one *scire feci* returned.

Practical Remarks.] *Of the remedy at common law in case of the death of either party after verdict or interlocutory judgment, and before final judgment.—Of the remedy by stat. of the 17th Car. II. in case of either party dying after verdict and before judgment, and of the construction and operation thereof.—Of the stat. 8 & 9 W. III. c. 11. in case of either party dying after interlocutory, and before final judgment, and of the construction and operation thereof.*

The third case above alluded to, in which it is proper to revive the judgment, is

3d, *Where either of the Parties, Plaintiff or Defendant, dies AFTER final Judgment and BEFORE Execution.*

In this case, the judgment must be revived by or against the *representatives* of the deceased party before execution can go.

The mode of reviving such judgment is the same *first* as above described.

Practical

Practical Remarks.] In what cases of either party dying after judgment and before execution, it is not necessary to issue a *sci. fa.*—How if there be many plaintiffs or defendants, and one only dies after judgment.—How to proceed if an executor or administrator, after having revived judgment by *sci. fa.* die before execution thereof.—Of proceedings where a feme sole marries either after the commencement of a suit and before judgment, or after judgment, and before execution.—Or where a feme covert is executrix or administratrix, and dies, pending a suit brought by or against baron and feme as such executrix or administratrix, or after judgment obtained by or against them therein, and before execution.

WASTE.

A writ of waste is an action partly founded upon the common law, and partly upon the *stat. of Gloucester*.

It may be brought by him who hath the immediate estate of inheritance in reversion or remainder, against the tenant for life, tenant in dower, tenant by the curtesy, or tenant for years.

So by one joint tenant or tenant in common against another.

But not by one coparcener against another.

It is also a mixed action; real, inasmuch as the land is recovered thereby; and personal, because damages are recovered.

By the *stat. of West. 2. 13 Edw. I. c. 14.* The process is settled to be by writ of summons, pone, or attachment and distringas to compel an appearance; and upon default of defendant on distringas, sheriff shall himself take a jury of twelve men to the place wasted, who shall inquire of the waste done, and the damages, and return an inquest.

Upon confession, or on default after appearance, jury on inquiry assess the damages only, the waste being acknowledged.

If defendant appear, plaintiff declares, and proceedings are carried on to issue and trial as in other cases, only in awarding *venire facias*, jury are to have a view of premises wasted.

By the *stat. of Gloucester*, in all cases where the waste and damages are ascertained, either by verdict, confession, or inquiry, judgment is given, that plaintiff shall have the place wasted, for which a writ of *seisin* issues; and also treble the damages assessed by the jury; to be recovered by *ca. sa.* or *fi. sa.* as in common personal actions.

☞ This action of waste is now seldom used, the general mode of proceeding by the reversioner against the tenant for waste done to the premises, being by an action upon the case in the nature of waste, which is a common personal action.

Practical Remarks.] Of the nature of waste, and its kinds.—Voluntary and permissive.—Of the different kinds of redress for waste committed;—preventive, and herein of the writ of estrepement;—corrective, and herein of the writ of waste.—Of the different *stat.* respecting this writ of 6 *Edw. I.* called the *Stat. of Gloucester*, and *stat. West. 2. 13 Edw. I. c. 14.* & *c. 22.*—By whom writ of waste may be brought.—Against whom.—In what cases it is the proper remedy.—Of the process and judgment.

Analysis.

PART IV.

Detached Heads of Practice,

Not included in either of the other PARTS;

With some Observations

On passing *Fines* and suffering *Recoveries*.

- | | |
|--|---|
| 1. Of Amendment and Jeofail. | 6. Of Suggestion on the Roll of the Death of one of the Plaintiffs or Defendants. |
| 2. Of discontinuing the Action. | 7. Of Summons and Motion. |
| 3. Of setting aside and staying Proceedings. | 8. Of Costs. |
| 4. Of the Statutes of Limitation. | 9. Of passing <i>Fines</i> . |
| 5. Of suing out Writ to save the Statute. | 10. Of suffering <i>Recoveries</i> . |
-

OF AMENDMENT AND JEOFAIL.

As mistakes are frequently discovered after the declaration or pleadings are filed or delivered, it is material to know in *what cases*, and upon *what terms* the party will be permitted to amend.

Of the Kinds of Amendments.

Amendments are either as at common law, or by statute.

In what Cases Amendments are allowed, as at Common Law.

The general rule at common law was, that whilst the proceedings were upon *paper*, amendments would be permitted.

But

But when once the *record* was made up, it was held that *no amendment* could be made unless within the very term in which the judicial act so recorded was done, the record during the term being deemed in the breast of the court; but afterwards it admitted of no alteration.

This, strictly speaking, is *still* the rule which is adhered to; for although the courts are become much more liberal, and will allow of amendments at any time *whilst the suit is depending, though the record be made up, and the term be past*, yet this can only be in cases where the proceedings may be *supposed* to be in *paper*; for when once they are *plainly upon record*, so that the court cannot help seeing that they are so, they have no authority to give leave to *amend*, except in such matters as come within the *statutes of amendment*.

No party, therefore, can withdraw a demurrer, and plead to issue, *after other issues* joined in the same cause have been *actually tried*, and verdicts found with contingent damages.

But if demurrer be to the declaration or plea, or avowry, where the *merits* do not come into question, but merely the *form* of pleading, *amendment*, before judgment pronounced, will be generally permitted on payment of costs.

It has hitherto been held, that plaintiff cannot add a *new count* to his declaration after the *second term*. The reason alledged is, because he must always *declare within two terms*, or he will be out of court, and a new count is *tantamount* to a declaration. This is certainly agreeable to the old rules of practice; but, by the late determinations, plaintiff, unless judgment of *non pros* be signed, may declare at any time *within four terms*: Quære then, Whether he may not *now* add a *new count* to his declaration at any time *within the four terms*?

Of Amendments by Statute.

As to the *statutes of amendment*, they only extend to pleadings of *record*; so that when the proceedings are *plainly upon record*, and are known to be so by the court, no amendments therein can be made except *such as are warranted by the statutes of amendments*.

The statutes are 14 Edw. III. c. 6.; 8 Hen. VI. c. 12. and c. 15.; the purport of which is, that the judges may amend in any record, process, word, plea, warrant of attorney, writ, panel, or return, all that which to them seems to be the *misprision of the clerk* (except appeals, indictments of treason, felony, and outlawries of the same).

All the other statutes, which are much more extensive in their nature, are held to be statutes of *jeofail*.

The statutes of amendments do not extend to *penal actions*.

Of the Terms on which Amendments are allowed.

The general terms of amending are, *upon payment of costs*; or, in some cases, giving an *imparlance*.

Plaintiff, however, may amend his declaration in matter of *form* after *general issue* pleaded, and before entry, without paying costs or giving an *imparlance*; but if in matter of *substance*, he must pay costs, or give an *imparlance*, at defendant's election.

In all cases of amendment, *after plea pleaded*, defendant has liberty to plead *de novo*, and has four days allowed for that purpose. It seems also, that a new rule to plead must be given. But *Q.*

Amendments, if proceedings in *paper*, may be made by *summons* before a judge; if proceedings on *record*, by *motion* in court.

Of Jeofails.

As the statutes of *amendments* only extended to what the judges should interpret the *misprision* of their clerks and other officers, it was found by experience that many just causes were overthrown for want of *form*, and other defects, not aided by those statutes, although they were good in *substance*, and therefore the statutes of *jeofail* were from time to time made.

These statutes are the 32 Hen. VIII. c. 30.; 18 Eliz. c. 14.; 21 Jac. 1. c. 13. and 16 and 17 Car. II. c. 8. which last has been called the *omnipotent* act from its extensive operation.

The above statutes only relate to cases after *verdict*.

But by the 4 and 5 Anne, these statutes are extended to judgments by *confession*, or upon a *writ of inquiry*, provided there be an *original writ* or *bill*, and *warrant of attorney*, duly filed *.

The last statute on this head is 5 Geo. I. c. 13. enacting, that no judgment shall be stayed or reversed for any defect or fault, either in *form* or *substance*, in any bill, writ, original, or judicial, or for any *variance* in such writs, from the declaration or other proceedings.

☞ The doctrine of *amendments* and *jeofails*, as to *what* may be amended, *the time* of amending, and the defects which are cured by *verdict* or not, is in itself intricate and comprehensive, and well worthy the investigation of the student. Perhaps the most *methodical* way of treating the subject would be, to consider the respective parts of the process, as the writ, bail-piece, declaration, plea, replication, issue, &c. in the order in which they occur in the prosecution of a suit, and arrange under each head the most material cases of amendments determined thereon.

2. OF DISCONTINUING.

If after the commencement of a suit, plaintiff should think the action not maintainable, either for want of merits, or from having mistaken the form of the action, or the parties to the suit, or should for any other cause wish to proceed no farther therein, he may *discontinue*; after which he may begin *de novo*.

Should plaintiff neither discontinue nor proceed, judgment of *non pros* will be obtained against him; and if he bring a *second* action for the *same cause*, without having discontinued the *first*, defendant may plead *ante action pendens*; and it will be then too late to discontinue.

* It should be remembered, that in order to support a judgment by *default* or *confession*, and to cure any formal errors in the proceedings by virtue of the statutes of *jeofail*, a special original in C. B. and a bill in B. R. must be taken out, and filed in the proper offices; and warrants of attorney, for plaintiff and defendant, also filed, agreeable to the above statute of Anne.

Of the Terms of Discontinuing.

In all cases where plaintiff discontinues, it is upon payment of costs.

Executors or administrators must pay costs on discontinuing, if they have knowingly brought their action wrong.

Of the Manner of Discontinuing.

1. By Side-bar Rule.

It seems, that at any time, either before or after declaration, until *issue* or *demurrer* joined, plaintiff may discontinue by getting a rule of course

B. B.

Of clerk of rules, for which pay 4s.; carry it to master, and get an appointment thereon for *taxing costs*; serve copy thereof on defendant's attorney; at the time fixed, master will proceed to tax costs, whether defendant's attorney attend or not. The rule is only conditional, and of no avail till the costs be paid.

C. B.

Of secondary, for which pay 4s.; get appointment from *prothonotary* to tax costs; serve copy thereof on defendant's attorney; if no attendance, repeat the service three times; costs will then be taxed, which pay immediately, as the rule is of no effect till such payment is made.

2. By motion in court.

After *issue* or *demurrer* joined, until *verdict* or *writ of inquiry* executed, plaintiff cannot discontinue without motion in court.

Practical Remarks.] In what cases court will refuse or grant leave to plaintiff to discontinue.—Not allowed after argument on demurrer, if the merits of the case come in question; but otherwise, if only the form of pleading.

3. With the consent of defendant.

After *verdict*, or execution of *writ of inquiry*, plaintiff it seems cannot discontinue without defendant's consent, because if plaintiff will not then enter up judgment, defendant may.

3. OF SETTING ASIDE AND STAYING PROCEEDINGS.

1. For Irregularities.

As it is frequently necessary to move the court to set aside or to stay proceedings for *irregularity*, it is material to know for what irregularities proceedings will be set aside, and at what time motion ought to be made.

In general, motion may be made any time before interlocutory judgment signed, but it is the safest way to apply to the court so soon as the irregularity is discovered.

2. Until

2. *Until plaintiff give security for costs.*

So also motions are often made to stay proceedings until plaintiff gives security for the payment of costs, in case judgment be against him; it is proper therefore to consider upon what grounds such a rule will be granted.

The courts of *B. B.* and *C. B.* differ in this respect: the first will compel plaintiff to give such security without any other cause shewn, than that of his being in a *foreign country*, although only in *Ireland*; but the court of *C. B.* will not insist upon such security merely because plaintiff *resides abroad*, unless an *affidavit* is produced, "that he went thither to avoid payment of his debts," or that "he is insolvent," and the like.

3. *Until costs in first action be paid.*

Motions are also sometimes made to stay proceedings until the costs in a former action for the same cause are paid; but this is seldom granted except in *ejectment*, unless the second action appears *vexatious*, and the merits have been fully tried in the first, or there are some other particular hard circumstances attending the case.

4. OF THE STATUTES OF LIMITATION.

Their Nature and Intent.

As well from the motive of "quieting men's estates and avoiding of suits," as also upon the principle that *vigilantibus non dormientibus jura subveniunt*, have the different statutes of limitation been passed. If therefore a plaintiff, through negligence or indolence, hath delayed prosecuting his claim, however just in its nature, beyond the time limited by the statute, such fact may be pleaded, and will be an effectual bar to the action.

The statutes, however, have provided (as hereafter mentioned) against certain circumstances, which, without any laches or default of plaintiff, might prevent him from commencing his suit in due time.

Of the Times limited by the Statutes for bringing Actions.

Actions must be respectively brought within the following times, to be reckoned from the period when plaintiff is by law entitled to bring such action.

Actions.	Statutes.	Years.
Writ of right, -	32 Hen. VIII. c. 12.	60
Formedon and ejectment, -	21 Jac. I. c. 16.	20
H		Actions.

ACTIONS.	STATUTES.	YEARS.
ACTIONS upon the case, (except slander)	21 Jac. I. c. 16.	6
ACTIONS upon account, — trespass,		
(except assault and imprison- ment)		
ACTIONS upon debt, if not upon a specialty		
ACTIONS upon detinue — replevin		
— trespass for assault, battery, and false imprison- ment,	21 Jac. I. c. 16.	4
ACTIONS upon slander for words,	Ibid.	2

☞ In all cases if judgment be obtained by plaintiff, and it is afterwards reversed on error, or arrested upon motion; or if defendant be outlawed, and outlawry afterwards reversed, plaintiff, or his representative, must commence a new action, within a year from that time.

Of the Provision in the Statutes.

Provided, that if the person entitled to such action be, at the time the cause of action arises or accrues, within the age of twenty-one, feme-covert, non compos mentis, imprisoned, or beyond the seas; or provided the person against whom the action is to be brought be at that time beyond the seas, in such cases plaintiff may bring his action at any time within the above limited periods, after such impediment is removed.

Practical Remarks.] Of the limitation for bringing actions before the statute 32 Hen. VIII.—Of the different statutes of limitation.—Of the construction thereof.—Of the provisions or exceptions in the statute, and the extent and operation thereof.—When the right of action shall be said to have accrued, and the statutes begin to operate.—To what actions and cases the statutes of limitation do not extend.—When a debt barred by the statute shall revive.

5. OF SUING OUT WRIT TO SAVE THE STATUTE.

The statutes are only a bar in case plaintiff has not commenced his suit within the time limited. Now the commencement of a suit is the suing out of a writ against defendant; if therefore any writ be sued out within the period specified (although no attempt be made to serve defendant therewith, or arrest him thereon, and no further steps be taken in the suit), such proceedings shall be sufficient to prevent the statutes of limitation from attaching.

Two things, however, are material to be observed; 1. That such writ must actually be sued out before the expiration of the limited period, as it will not be allowed to operate by relation; (i. e.) if the writ be sued out in vacation, although it may bear teste the last day of the preceding term,

term, yet if the limited time expired between the last day of the term and the *actual* issuing of the writ, such writ shall be of no avail.

2. That such writ must be *properly* returned and filed, and an entry thereof made upon record and docketed.

How to make the Entry thereof.

Having got writ in the usual way, carry it to sheriff's office, and get it returned "*non est inventus*:" then enter the writ and return thereof on a roll of the term writ is *returnable*; let the roll be *entered, docketed, and carried in*, as in other cases (*vide ante* p. 34.); then carry writ to be filed with *signer of writs* in *B. R.* or *custos brevium* in *C. B.*

When plaintiff afterwards brings his action, if defendant *plead* the statute of limitation, plaintiff may *reply* the suing out of the writ, and that the same has been *continued* from term to term until that time, setting forth such *continuances*; which *continuances* may be afterwards entered upon the roll.

☞ This mode of suing out process to save the statute, may be adopted in all cases, either by *bill of Middlesex, latitat, capias, attachment of privilege*; or by *special original* against a *peer*.

6. OF THE SUGGESTION ON THE ROLL OF THE DEATH OF ONE OF THE PLAINTIFFS OR DEFENDANTS.

By 8 and 9 Will. III. c. 7. it is enacted, That "if there be two or more plaintiffs or defendants, and one or more of them should die, if the cause of such action shall survive to the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants, the writ or action shall not be thereby *abated*, but, such death being *suggested upon the record*, the action shall proceed at the suit of the surviving plaintiff or plaintiffs against the surviving defendant or defendants."

In whatever stage of the cause, therefore, one of the plaintiffs or defendants should happen to die, whether after the writ sued out, and before declaration, or after issue joined, and before trial, or after verdict, such death should be *suggested* in the *declaration*, or on the roll after the entry of the *issue* or the *postea*, as the case may be.

7. OF SUMMONS AND MOTION.

It is frequently necessary, in the progress of a cause, for the parties to apply, either by their attorney or counsel, to a judge at his chambers, or to the court in which their suit is pending, to obtain certain *orders and rules*, agreeable to the urgency of their case; the first of which is procured by *summons*, and the last by *motion*.

Of proceeding by SUMMONS.

A *summons* may be taken out before any judge of the court wherein the action is brought, for which 1 s. is paid; and the same for every *renewal* thereof, whether in term or vacation.

A true *copy* of the summons must be served on plaintiff or defendant's attorney; and if there be no attorney, on the parties themselves, or left for them at their last place of abode. As it may afterwards be necessary for the person serving same to swear to such service, he ought to examine it with original.

At the hour appointed by the summons, the attorney taking out same ought to attend at judge's chambers, and wait one hour for the attorney of the adverse party; if he do not attend by that time, then take out and serve a *second* summons, marking thereon, *Second Summons*; upon which attend as before, and again renew the same, and serve it, marking the *third* summons, which if not obeyed, make *affidavit* before the judge of having taken out and attended upon the third summons, and a judge's clerk will give you an *order* for the matter applied for. Pay for each order 2 s. and serve same in like manner as the summonses.

If judge's order be *disobeyed*, and the party who applied for it would wish to enforce it by *attachment*, he must previously move to make the judge's order a *rule of court*, and then move for an *attachment*, which the court will in some cases award in the first instance; but generally a *rule nisi* is granted to shew cause why an attachment should not issue.

Summonses are taken out for a variety of purposes, such as for further time to put in, add, and justify bail, to plead, reply, &c. for payment of debt and costs, for discontinuing, for staying proceedings on bail-bond, for superseas, and the like.

Of proceeding by MOTION.

Upon the first application to the court (unless it be a mere motion of course, which is obtained in the first instance), a *rule nisi*, as it is called, is granted, which is *conditional*, to be made *absolute*, unless no cause be shewn on the other side to the contrary.

To obtain a *rule nisi*, it is necessary to give *notice* in writing to the adverse party's attorney or agent; of the service whereof, *affidavit* must be made, and the notice served be annexed to it; the affidavit must also state the facts on which the motion is grounded; it must be *ingrossed* on an 1 s. 6 d. stamp, and sworn in court, or before a judge, and a copy thereof given with brief to counsel or serjeant to move.

When *rule nisi* is ordered, it is filed with *clerk of rules* in **B. R.** and *prothonotary* in **C. B.** and the attorney of the other party served with a copy thereof. The party on whom rule is so served, must also take a copy thereof, together with a copy of the *affidavit* from the *clerk of rules* or *prothonotary's* office before he will be permitted by the court to shew cause.

At the day appointed in the *rule nisi*, the party who obtained the same must move to make it *absolute*; at which time, if there be any opposition thereto, cause is shewn; if not, it is made absolute of course.

It is impossible to enumerate the various occasions on which *motions* are made. They are proper in all cases of irregularity, and in all errors in process, or on writs of inquiry, or to set aside or stay proceedings, or for setting aside awards, or for putting off trials, or for new trials, or in arrest of judgment, and the like.

OF COSTS.

At common law, no costs were allowed *eo nomine* either to plaintiff or defendant; but if plaintiff prevailed, defendant was in *miser cordia* for his unjust detention of plaintiff's right; and if defendant prevailed, plaintiff was amerced *pro falso clamore*.

The costs however, or *expensa litis*, were generally considered as included in the damages assessed, in such actions where damages are given; but such damages being found inadequate, and in many cases not given at all, it was thought expedient to pass from time to time certain statutes allowing *costs of suit* to the parties, which was the origin of costs *de incremento*.

Of PLAINTIFF'S Costs.

The first and leading statute giving costs to plaintiff, is that of Gloucester, 6 Edw. I. c. 1. whereby costs were to be allowed to plaintiffs in all cases where damages were recoverable.

Where Plaintiff shall recover no more Costs than Damages.

The legislature, in after-times, finding that vexatious and malicious actions were frequently brought for trifling injuries, restrained in some measure the operation of the stat. of Gloucester, by enacting, that in certain cases, plaintiff should be allowed *no more costs than damages*.

These exceptions are, 1st, In all actions of trespass *quare clausum fregit*, trespass assault, and battery, where the damages given are under 40s. unless the judge certifies that an assault and battery was sufficiently proved by the plaintiff against the defendant, or that the freehold or title of the land mentioned in plaintiff's declaration came chiefly in question. 22 & 23 Car. II. c. 4. The certificate above alluded to, ought to be applied for upon the trial, as ante, p. 32.

☞ This stat. does not extend to damages assessed on a writ of inquiry.

2d, In all actions upon the case for words where the damages given are under 40s. 21 Jac. I. c. 16.

☞ This statute does extend, by the express letter thereof, to damages assessed on writs of inquiry.

But the words must be in themselves actionable, and not merely so in consequence of the special damage sustained.

Also, where the original debt to be recovered is proved to be under 40s. and the action ought to have been prosecuted in the inferior courts, plaintiff shall pay defendant's costs upon a suggestion duly made, as ante, p. 32.

But to discourage idleness, full costs are allowed, whatever the damages may be, for all trespasses in hunting, fishing, or shooting, &c. committed by apprentices or inferior tradesmen. 4 & 5 W. & M. c. 23.

So for wilful and malicious trespasses, as if repeated after due warning, or the like, provided the judge certifies such trespass to be wilful or malicious. 8 and 9 W. III. c. 11.

Of DEFENDANT'S Costs.

Costs, we have observed, although not allowed *eo nomine* to plaintiff before the stat. of Gloucester, were yet deemed to be included in the *quantum* of the *damages*, but they were given to *defendant* in no shape whatever at common law; but the stat. of Marl. 52 H. III. c. 6. and the several statutes, 7 H. VIII. c. 4.; 21 H. VIII. c. 19.; 33 H. VIII. c. 15. and 4 Jac. I. c. 3. extended the allowance of costs to *defendants* after *nonsuit* or *verdict*, in all actions *wherein* plaintiff was intitled to costs.

by subsequent statutes, costs are given to defendants in other cases besides those after *nonsuit* or *verdict*.

As by 8 Eliz. c. 2. and 13 Car. II. st. 2. c. 2.

For *discontinuance* by plaintiff, or not *declaring* in time.

By 8 & 9 W. III. c. 11. § 1. upon judgment on *demurrer*.

By 8 & 9 W. III. c. 11. § 2. where there are several defendants in trespass, assault, false imprisonment, or ejection, and any or either of them are acquitted by verdict, costs shall be allowed to those acquitted.

By 14 G. II. c. 17. on judgments, as in case of a *nonsuit* for not proceeding to trial.

So for not executing writ of inquiry, but this is only by rule of court, not by statute.

Of Costs in particular Actions and Cases, not included in Stat. of Gloucester.

The stat. of Gloucester only allowed costs generally in all actions where damages were before recoverable; but as damages were not given in *waste*, *scire facias*, *prohibition*, and actions for not setting out *tythes*, costs of court were not allowed. This defect is remedied by 8 & 9 W. III. c. 11. which gives costs in such proceedings to both parties reciprocally.

Costs in error are now recoverable in all cases by virtue of the several statutes of 3 H. VII. c. 10.; 3 Jac. I. c. 8.; 13 Car. II. st. 2. c. 2.; 4 & 5 Ann. c. 16. and 8 & 9 W. III. c. 11.

By 4 & 5 Ann. c. 16. if defendant in any action plead several matters, or plaintiff in replevin avow several matters, and upon issue or demurrer joined, any or either of them be found against the party pleading the same, proportionable costs shall be allowed to the other party, unless the judge certify that there was probable cause for such plea or avowry.

Of Costs where Officers are Parties to the Suit.

By 7 Jac. I. c. 5. and 21 Jac. I. c. 12. double costs are allowed to justices, mayors, or bailiffs of a city or town corporate, headboroughs, portreeves, constables, tythingmen, collectors, churchwardens, swornmen, and overseers of the poor, in all actions upon the case, trespass, battery, or false imprisonment, brought against them, where plaintiff is non-prossed or nonsuited, or a verdict is given against him.

This

This act extends to all *deputy constables*, and others acting under a *warrant*.

There are also other statutes giving *costs* to both parties reciprocally upon actions against *excise officers*, *customhouse officers*, and the like.

Of Costs in popular Actions.

Common informers, in all cases, *pay costs*, if they fail in their action, by 18 Eliz. c. 5.; but they are only *intitled* to costs if they succeed therein, where the *statute* on which they sue *expressly gives costs*.

This statute extends to all *penal statutes* made even *subsequent* to 18 Eliz.

Of Persons exempt from the Payment of Costs.

An *infant* suing by *prochein ami*, or *guardian*, is not liable to costs; but it seems that the *prochein ami* is; an *infant defendant* must always pay costs, if verdict be against him.

Paupers (plaintiffs) by the stat. of 23 H. VIII. c. 15. are not liable to costs.

Executors or *administrators* (plaintiffs) are also not within the statutes of costs, except they negligently suffer a *non pros*, or *discontinue*, having *knowingly* brought their action *wrong*.

If however the cause of action be such, that they *might* have sued in their *own right*, and not as *executors* or *administrators*, they shall pay costs if they fail therein.

Executors or *administrators*, defendants, are liable to costs equally with other persons.

Of double or treble Costs.

It may be remembered, that the stat. of Gloucester gives *costs* in all cases where *damages* were before recoverable.

Whenever therefore a statute gives *double* or *treble damages*, without mentioning any *costs*, the general rule is, that if it be for any cause of action whereon *damages* were recoverable at *common law*, the party shall be allowed as well the *double* or *treble costs*, as *double* or *treble damages*; but if otherwise, then the *double* or *treble damages only*, and no costs.

Where a stat. gives *double* or *treble costs*, it means *double* or *treble costs de incremento*.

In cases of *double* or *treble damages* being given, the jury at the trial first assess the *single damages*, which are *afterwards* doubled or trebled at the time of taxing costs.

How Costs taxed.

Such is the general doctrine of costs, which were formerly taxed by the judges themselves; but now after the judgment is obtained, and the rule for judgment expired (*vid. ante*, p. 33.), costs are taxed by the *master* in *B. R.* or *prothonotary* in *C. B.* upon the *attornies* attending for that purpose at *B. B.* or *prothonotary-office*; *master* or *pro-*

thonotary then marks the amount thereof on postea, inquisition, or demurrer roll (vid. ante, p. 36. 42.), and then *final judgment* is completed.

☞ It might be useful to consider the extent and construction of the above statutes respecting costs; but let it suffice to observe in this place, that all such statutes must be construed *strictly*, and that whenever the action be such as would intitle *plaintiff* to costs, *defendant* shall also be intitled.

OBSERVATIONS

ON THE

MODE OF PASSING FINES

AND

SUFFERING RECOVERIES.

FINES and RECOVERIES being at this day the most common assurances and conveyances, it is highly expedient, both for the student and practitioner, to be somewhat acquainted with the nature and operation thereof, and the proceedings relative thereto. A few observations thereon cannot therefore be deemed foreign to our present purpose.

I. OF PASSING FINES.

A Fine.—Its Nature.

Various are the definitions given of a *fine* by the different writers on the subject. Some call it a *feoffment of record*; others, more properly, an *acknowledgment* of a feoffment of record.

But the description most suitable, perhaps, to our present purpose, as explanatory of the mode of passing a *fine*, may be the following.

A fine is an amicable agreement or compromise of a fictitious suit, grounded upon a writ of covenant, or other original writ; which agreement must be made with the king's consent and licence, and acknowledged by the parties thereto before the justices of common pleas, or others thereunto authorised, and be *ingrossed of record* in the same court.

Its Kinds.

There are four sorts of fines:

1. *Sur cognizance de droit come ceo qu'il ad de son done.*
2. *Sur done grant et render.*
3. *Sur cognizance de droit tantum.*
4. *Sur concessit.*

Fines

Fines are either *executed* or *executory* :

Executed, when the legal possession of the lands contained in the fine is thereby *immediately* transferred to and vested in the *conusee*, so that he may enter thereon :

Executory, when such possession is *not* immediately transferred ; but something further is requisite, as a writ of *habere facias seisinam*, to entitle the conusee to enter.

Fines are also *single* or *double* :

Single, when an estate is conveyed thereby, and nothing granted *thereout*, or *rendered back*, by the conusees :

Double, when there is some *grant and render back* to the *conusor*, as a rent, common, or the like.

Fines are either with *proclamations*, or without.

At common law there were no *proclamations* ; and yet, if any stranger, having any claim to the lands or tenements conveyed by the fine, did not put in such claim within *a year and a day* after the fine levied, he was barred for ever. This was often found extremely hard, and to remedy the evil the 34 *Edw. III. c. 16.* enacted, " that *nonclaim* on a " fine should be no bar ; " so that at any period or distance of time whatever, the party might make his claim. But this remedy was worse than the disease, for men could never be secure in their possessions. As a medium between both extremes, the statute of 4 *Hen. VII. c. 24.* after ordaining that fines shall be *proclaimed* in four several terms, enacts, " That, the *proclamations* being so made, the fine is to conclude as " well privies as strangers, except *feme coverts*, infants, &c. not being parties thereto ; and saving to all strangers, any right, claim, " or interest they may have, provided they pursue such right within five " years from the time it accrues." This statute was afterwards explained by 32 *Hen. VIII.* Fines, therefore, passed agreeable to these statutes, are always levied with *proclamations*.

One advantage of levying a fine with *proclamations*, according to 4 *Hen. VII.* and 32 *Hen. VIII.* is, that a *nonclaim* of *five* years makes it a complete *bar* ; whereas if it be *not* with *proclamations*, a *nonclaim* will be no bar, because the statute of 34 *Edw. III.* above mentioned will then prevail : besides which, a fine levied with *proclamations* is much more extensive in its operation.

The fine *sur cognizance de droit come ceo qu'il ad de son done* is the best and surest of all fines, and therefore generally used ; it is a *single* fine, *executed* ; and to make it of full force, should be levied with *proclamations*.

Its Operation.

The operation of a fine is to bar the *estate tail*, and that only ; not any *remainders* or *reversions* dependant thereon ; for to effect this, a *common recovery* is requisite.

But where tenant *in tail* has the immediate reversion in fee in himself, he may make a good title by fine only, all his issue being barred thereby.

But this is merely to be understood of fines levied with *proclamations* ; for otherwise they have only the operation of fines at *common law*, which,

which, when levied of an estate tail, create a *discontinuance*, but do not bar the issue from bringing a *formedon*.

Of the Mode of levying a Fine.

From the description above given of a fine, it is obvious, that there are *five* things necessary to be done in passing the same. 1st, There must be an *original writ* sued out. 2d, An *agreement*, by way of compromising the suit, is to be made. 3d, The *king's consent or licence* for the parties to agree must be obtained. 4th, The agreement must be *acknowledged* by the parties thereto before the justices of common pleas, or others thereunto authorised. And, 5th, It must be *ingrossed of record*. Add to which (provided it be levied agreeable to the statute), *proclamations* must be duly made and indorsed thereon. Of each in their order—

1. Of the Original Writ.

Any original writ used in *real* actions will do, but not an original in a *personal* action.

A writ of *covenant* is the one generally sued out, which writ is in this case a *real* action, for it is to have execution and performance of the covenants, as well as damages for the breach thereof. There is a certain fine called the *premier* or pre-fine to be paid thereon, but which is not actually paid till after the acknowledgment.

The writ is sued out by the person to whom the land is to be conveyed (called the *conusee*, for the reason hereafter given), against the person who is to convey the same (called the *conusor*), upon a supposed breach of covenant,

How to sue out same.

Make out *precipe* for the *curfitor* of the county where the lands lie, who will prepare *original*. Pay 7 s. 6 d. There should be 15 days between the *teste* and *return*, and it should not be returnable until *after* the acknowledgment.

2. Of the Concord or Agreement.

The action having been commenced, it is presumed that the *conusor* (or person against whom it is brought), conscious of his being in the wrong, is desirous of a compromise. To effect this, the *concord*, or *agreement*, is drawn up, which is an *acknowledgment* or *recognition* that the lands or tenements are the *right* of the demandant, "as those which the demandant has of the gift of the deforciant:" from which words it is denominated, a fine *sur cognizance de droit come ceo que il ad de son done*. And the person making this acknowledgment or cognizance is therefore called the *conusor*, and the person to whom it is made, the *conusee*.

3. Of the Licentia Concordandi.

The *concord* or *agreement* being made, the third thing, as above described, to be done is, the obtaining of the *king's consent or licence* for the parties to agree, otherwise it is of no avail. This consent is procured

cured by paying a certain fine called the *post-fine* (in opposition to the fine first paid upon taking out the *original writ*, called the *premier* or *pre-fine*), or sometimes the King's silver; but this is not in fact paid till after the taking of the acknowledgment. This fine *pro licentia concordandi* is paid upon the presumption that the *conusee*, having given pledges at the commencement of the suit to prosecute the same, if he should neglect so to do without the king's leave, such pledges would be liable.

The *licentia concordandi* is ingrossed on the fine between the *precipe* and *concord*, and is one of the parts thereof.

The *concord* being the *very agreement* of the parties, declaring in what manner the lands shall pass, it is of the utmost consequence that it be made and acknowledged freely and openly, without any fraud, covin, or coercion.

For this reason in the above description of a fine, which is said to be *an amicable agreement of a fictitious suit made with the king's consent*, it is added, that this agreement must be *acknowledged* by the parties *there-to before the justices of common pleas, or others thereunto authorised*. The next thing therefore to be done is, the making

Of the Acknowledgment.

The taking of the *acknowledgment* by the justices, or others, is in consequence of the statute of *Carlisle*, 15 *Edw. II.* which enacts, "That all the parties levying fines shall, before the passing of such fines, appear *personally* before the justices, so that their *age, ideocy, or other default* (if there be any), shall be adjudged and discerned by the said justices."

Who may take the Acknowledgment.

By the statute *de finibus*, 18 *Edw. I.* fines should be levied before the *four justices* of the bench; but, by 4 *Hen. VII.* before *two* of them is sufficient. Hence it is clear, that a fine acknowledged in term time in the court of *C. B.* must be effectual. By custom and usage also, for he does not appear authorised by any *statute*, the *chief justice* of the common pleas may himself, *out of court*, take the acknowledgment.

So that a fine may be acknowledged either *openly in court*, or *privately before the chief justice*, at his house or chambers, without any *special authority* for that purpose. But there may be other persons *specially authorised* to take such acknowledgment, occasioned by the parties living at a distance, or being unable, through sickness or other causes, to appear *personally* at Westminster. Hence fines are frequently acknowledged before *commissioners* specially appointed and authorised to take the same, by a certain writ or commission issuing out of chancery, and directed to them, called a *dedimus potestatem*.

Sometimes, also, the acknowledgment is taken by a *judge on the circuit*; in which case a *dedimus* must be afterwards had to render it valid and effectual.

This practice of authorising persons by virtue of a *dedimus* to take acknowledgments, seems to be in consequence of the statute of *Carlisle* before

before mentioned, in which there is a *proviso*, "That if any person be by age or impotency decrepit, or by casualty so oppressed and withholden that by no means he is able to come before the justices in court, then two or one of the justices, by the assent of the residue of the bench, shall go unto the party so diseased, and shall receive his *consuance*."

At this day a *dedimus* is granted of course.

There are four ways then, we find, of acknowledging a fine.

1. *At the bar of the court.*
2. *Before the chief justice at his house or chambers (in which cases there is no need of a dedimus).*
3. *Before commissioners specially named and appointed.*
4. *Before a judge upon the circuit (in which cases a dedimus must be had).*

We shall briefly treat of each in their order.

1. Of acknowledging a Fine at the Bar of the Court of C. B.

Having got the writ of covenant upon your *præcipe* from the curfitor, ingross the *præcipe* and *concord* upon parchment; take the writ, *præcipe*, and *concord*, to a serjeant at the bar of the court; let the *conusors* accompany you; the serjeant will get it passed. If one of the *conusors* be a *feme covert*, the chief justice will examine her apart as to her consent. Having got the writ, *præcipe*, and *concord*, returned to you, annex the *præcipe* and *concord* to the writ, and pass them through the offices as hereafter directed.

2. Of acknowledging a Fine before the Chief Justice.

There is no necessity in this case to bespeak writ of covenant till after the acknowledgment taken.

Having ingrossed *præcipe* and *concord* on parchment, make a copy thereof on paper; go with *conusors* to the house or chambers of the C. J. give both the *præcipes* and *concords* to the clerk; the C. J. will take the acknowledgment of the parties, and will sign the *ingrossed præcipe* and *concord*, which will be returned to you; the paper copy will be kept by the clerk; pay 12 s.; then take them to *curfitor* for the writ, if none got before, and proceed as hereafter directed.

3. Of acknowledging a Fine before Commissioners in the Country.

In the *præcipe* for the writ of covenant, name the commissioners you wish to be appointed: one ought to be a knight, agreeable to a rule of court, *East. 43 Eliz.* Carry *præcipe* to *curfitor*, who will make out the *dedimus*, pay 11. 5 s. 8 d.

Ingross *præcipe* and *concord* on parchment as before, and send down same, with *dedimus*, into the country to be delivered to commissioners; or if in town, attend commissioners yourself with *dedimus*. Any two of them may take the acknowledgment, which having done, they should subscribe

subscribe their names to the *caption*, and also to an *indorsement on dedimus*, that "the execution thereof appears in a schedule thereunto annexed." After which, according to another rule of court, 13 Geo. I. one of the commissioners, or some other person who was *present* at the taking of the acknowledgment, and who knows the parties, must personally appear before the C. J. or some other judge, and make oath of the due execution of the *dedimus*. The judge will then write his *allocatur* under the concord, for passing the fine; after which, take *præcipe*, *concord*, and *dedimus*, to *curfitor*, get the writ of covenant, and proceed as hereafter mentioned.

4. Of acknowledging a Fine before a Judge on the Circuit.

Ingross *præcipe* and *concord* on parchment, take copy thereof on paper, go with the *conusors* to the judge, who will take acknowledgment, and return you the *ingrossed præcipe* and *concord*; pay 13s. When judge comes to town, get *dedimus* of *curfitor* directed to such judge, which carry to his chambers, and his clerk will *certify* thereon the caption; pay 1s. 6d.; then get writ of covenant, and proceed as hereafter mentioned.

Of the different Offices through which a Fine must pass.

The writ of covenant being obtained, and the concord made, ingrossed, and properly acknowledged, in order to complete the fine, they must pass through the several following offices for the respective purposes hereafter mentioned, viz. the *alienation* office, the *return* office, the *warrant of attorney* office, the *custos brevium* office, the king's *silver* office, and the *chirographer's* office.

Alienation Office.

It has been observed, that upon the taking out of the *original*, a fine, called the *premier* or *pre-fine*, is to be paid, which is *pro licentia alienandi*, i. e. for the king's leave to alien the lands about to be conveyed; which fine is not actually paid till this time. Take writ, *præcipe*, and *concord*, to the *alienation* office for this purpose, which is called getting the writ *compounded*, there being certain persons appointed to settle and *compound* these fines.

Formerly nothing more was done at this office; but now, by *stat. 32 G. II. c. 14.* the other fine, called the *post fine*, or *king's silver*, which is *pro licentia concordandi* (as above mentioned), is also to be paid here; it is always as much, and half as much more, as the *pre-fine*.

Return Office.

Then take writ, *præcipe*, and *concord*, to the *return* office, to get the writ *returned*; the return of the sheriff will be indorsed thereon, which is, as in other *real* actions, nothing more than the fictitious names of the *pledges* to *prosecute*, and of the *summoners*; pay 1s. 6d.

From the return-day of the writ, the *post fine* having been paid, the fine begins to *operate*.

Warrant of Attorney Office.

Make out warrant of attorney, file it with *clerk of warrants*, pay 4d.; he will stamp the writ, and also keep a ~~note~~ of the writ of covenant.

Custos Brevium Office.

Go to *custos brevium*, who will indorse on *concord* the term of which fine was proclaimed, and also stamp writ and concord; pay 3s. 8d.

Then apply to *curfitor* to mark on writ the sum paid for the *pre-fine*, *pro licentia concordandi*, which is called getting the writ *pro'd*.

King's Silver Office.

After which, carry writ, *præcipe*, and *concord*, to king's silver office, where, since the *post-fine*, or king's silver, which used to be paid here, is now paid at *alienation* office as above mentioned, nothing is done but merely stamping the writ and concord, and an entry taken of the fine, to be kept there.

☞ Sometimes fines, as upon mortgages, are carried no further than this office, and are recorded here.

Chirographer's Office.

The last office is the *chirographer's*, to which writ, *præcipe*, and *concord*, must be taken, and the proper clerk will make out the *indentures of fine*; call for the same a few days after, pay 3s. 6d. or more, according to the number of warranties.

The fine is then *completed*, for it becomes *ingrossed on record*, which it may be remembered was the *last* thing necessary to be done, according to the description above given. The record of the fine, which remains in the possession of the *chirographer*, is deemed the *principale recordum*, and always considered the true record.

The *Chirograph* of a fine is good evidence thereof.

☞ The fine, if it be insisted upon, may be detained two days in each of the respective offices above-mentioned (except warrant of attorney's office), whereby not only great delay would be occasioned; but if near the end of term, *post terminus*, and other *extra* fees, would become chargeable; but by paying the different clerks the trifling gratuity of 6d. for expedition, the fine may be carried through all the offices in one day.

N. B. If the lands lie in *different* counties, there need be only *one* *dedimus*, which may be had of the *curfitor* of either county, and also only *one* *concord*, but there must be *several* writs of covenant.

Of the Proclamations.

The last step proper to be taken in order to complete the fine according to the statute, which it is the safest way to do for the reasons before given, is, to get the *proclamations* duly made and indorsed thereon.

Fines are to be proclaimed, during term, at the time the court is sitting, *four* times; once in the term wherein they are *ingrossed*, and once in each of the three subsequent terms.

Should

Should there be any error in the *proclamations*, the fine will still be a good one as at common law, subject, however, to the inconvenience of the statute of nonclaim above mentioned.

Of the Inrolment of Fines.

By 5 H. IV. c. 14. all the proceedings on fines, both previous to, and at the acknowledgment thereof, *should be inrolled* of record in the court of common pleas; but by 23 Eliz. c. 3. the whole proceedings *may, upon the request or election* of any person, be inrolled.

The inrolment seems only a further security at the *election* of the party, in case any accident should happen to the record at the chirographer's.

Thus then, agreeable to the description of a fine above mentioned, we find it to be "an amicable agreement of a fictitious suit, grounded upon a writ of covenant, which agreement must be made with the king's consent and licence, and acknowledged by the parties thereto before the justices of Common Pleas, or others thereunto authorized, and be ingrossed of record in the same court." It may afterwards be proclaimed and inrolled, though it is a good fine without.

Of the Parts of a Fine.

A fine, when completed, consists of five parts: 1. The writ of covenant, or original writ. 2. The *licentia concordandi*. 3. The concord.—All of which we have sufficiently considered. 4. The note, which is only an abstract of the writ and the concord, naming the parties, the parcels, and the agreement. And, 5. The foot, or conclusion, which includes the whole matter, the parties, times, places, and before whom it was acknowledged; of this the *indentures* or *chirograph* are made at chirographer's office, and delivered to the parties. It begins with, *Hæc est finalis concordia*, and then recites the whole proceeding at length.

Of stopping a Fine from passing.

In order to stop any fine from passing, enter a *caveat* at the king's silver office, and notice will be given you if such fine should be attempted to be levied.

Of searching for a Fine.

Search for fines at the king's silver office, where entries are kept, or at the chirographer's office.

Of avoiding Fines.

1st, By entry. Any person, having right of entry on the lands conveyed, may, by making an *actual* entry thereon within the *limited* time, avoid a fine; but it must be an *actual* entry, for confession of lease, entry, and ouster, as in ejectment, will not do. And, by statute 4 Ann. c. 16. where the fine is levied with *proclamations*, no such entry shall be of avail, unless

unless an *action* shall be commenced thereon *within one year* after the making of such entry, and prosecuted with effect.

2d. By *plea*, as if the parties levying the fine had no estate of freehold in the lands conveyed, then any stranger (but not a *party* or *privy* to the fine), having a claim, may avoid the fine, by pleading *partes finis nihil habuerunt tempore levationis finis, sed quidam A B cujus statum ipse habet*.

3d. Fines may be set aside and avoided for *fraud, deceit, or covin*.

Of reversing Fines.

Fines can only be reversed by writ of error, being deemed judgments given in a court of record. Error may be brought in **W. B.** any time within *twenty years* after fine levied; but it must be by a *party* or *privy* to the judgment.

☞ The transcript of the note of the fine is removed into **W. B.** and thereon errors are assigned. If the court think the errors fatal, and that the fine ought to be reversed, a *certiorari* issues to the *chirographer* to certify the *very note* of the fine, which when certified to the court, it is actually cancelled; or a writ may be sent to the treasurer and chamberlains of the exchequer to take the fine off the file.

As the proceedings in a suit are considered *in fieri* until judgment given (although the record be made up), a fine may be amended or invalidated at any time during the term in which it is levied, by motion in court of **C. B.**

OF SUFFERING RECOVERIES.

The Nature of a Common Recovery.

A common recovery is a judgment obtained in a *fictional* suit brought against the tenant of the freehold, in consequence of a default made by the person who is last vouched to warranty in such suit.

But although it be a *fictional* suit, yet the same forms and mode of proceeding must be observed and adhered to, as if it were an *adversary*, or actual suit. It may be useful, therefore, briefly to consider the ground and principles of such adversary suit.

When a person purchased a freehold estate, the vendor warranted the title to the vendee; if therefore he had in fact no such title in him, and the rightful proprietor of the lands afterwards brought his *real* action against the tenant of the freehold for the recovery thereof, such tenant called upon or vouched (from *voco*, to call) the person who made such warranty to him; and if it happened that the vendor had himself bought the lands under similar circumstances, and under a warranty from a third person, he called upon or vouched such third person upon his warranty, and so *toties quoties*. The consequence of which was, that the demandant or plaintiff recovered judgment against the tenant, and the tenant had judgment against the vouchee, to recover lands of equal value in recompence of the lands so warranted by him.

Such also is the principle of a *common recovery*, the only difference being, that the last vouchee, or person called upon, who is always a *nominal* person, as the *crier of the court*, or the like, and is denominated the *common vouchee*, upon being vouched pleads, and then makes *default*; upon whose default, judgment is recovered by the demandant against the tenant, who is *supposed* to have his recompence from the vouchee; which recompence, although merely *nominal*, is the chief corner-stone of this artificial structure, a *common recovery*; for it is allowed, that the reason of the original determination of the judges in favour of a common recovery being a good bar to an estate tail, was because the issue in tail had a *recompence* in value, either real or fictitious, for the estate-tail which was recovered.

Of the Force and Effect of a common Recovery.

Common recoveries operate as an absolute bar not only of all estates tail, but of *remainders and reversions* expectant on the determination of such estates; whereas it may be remembered, that a fine only barred an estate-tail, and not the remainders or reversions.

So a common recovery bars all *contingent* remainders; but not an *executory devise*, unless the person to whom the executory devise is given comes in as a vouchee. But the operation of a common recovery is governed by the number of persons vouched in the suit, for it may be suffered with a *single, double, or treble* voucher, or even with a greater number.

If suffered with a *single* voucher, (i. e.) where the *præcipe* is brought against the tenant in tail himself, who immediately vouches over the common vouchee, it is a good bar to the estate, whereof the tenant in tail is in *possession* at the time of the recovery, but not to any other estate.

If suffered with a *double* voucher, (i. e.) where the *præcipe* is brought against some other person, and the tenant in tail is vouched, who then vouches the common vouchee, it is not only a bar to the estate whereof he is then in *possession*, but also to all other estates to which he has any *right*, although such estates be devested out of him, and discontinued.

If suffered with a *treble* voucher, it is a perpetual bar to the estate whereof the tenant to the *præcipe* was seised, and of every other estate which has ever been in the first or second vouchee, or their ancestors, and of all *remainders and reversions*, and *charges and incumbrances* thereon.

Of the Essentials to a common Recovery.

It has been before observed, that the same formal precision is necessary in suffering a common recovery, though a fictitious action, as if it were an adversary suit. There are *five* things therefore *essential* to the validity of a common recovery. 1st. *A proper original Writ.* 2d. *A good Tenant to the Præcipe.* 3d. *The vouching by the Tenant.* 4th. *The Judgment.* 5th. *The Execution thereof.* Of each briefly in their order.

1st. Of the original Writ.

Upon any writ whereby lands are demandable, a common recovery may be suffered, but the usual one is a writ of entry, *Sur disseisin in le poss.*

This

This writ was given by the stat. of Marl. 52 H. III. c. 30.; for at common law no person dispossessed of his lands was intitled to recover them by this *possessory* action of a writ of entry, after more than *two alienations or descents* had passed.

If *one* alienation or descent only had taken place, the writ of entry was in the *per* (as it is called), because it stated, that the tenant had not entry but *by A B, nisi PER A B, qui se in illud intrusit et illud tenenti dimisit.*

If *two* alienations or descents had passed, it was in the *per* and *cui*, stating that the tenant had not entry but *by C D, to whom A B, who was the original wrongdoer, demised it, nisi PER C D, CUI A B illud dimisit qui se in illud intrusit.*

And these were the only writs of entry at common law, the demandant after *two* degrees, i. e. two alienations or descents, being driven to his writ of *right*.

But the writ of entry in the *post* is of a more general and comprehensive nature, avoiding any deduction of title from the original intruder to the tenant, and merely alleging, that the tenant had not entry unless *after* or subsequent to the ouster or intrusion made by the original wrongdoer, *nisi POST intrusionem quam A B in illud fecit.* Nor indeed can any thing more be requisite, since, if the original title be bad, so of course must be the derivative title.

2d. Of the Tenant to the Præcipe.

All real actions for the recovery of land must be brought against the person *actually in possession of the freehold*, otherwise they would be ineffectual, since no *seisin* could be had.

Likewise in *common recoveries*, it is absolutely requisite that the tenant to the *præcipe* (so called from the writ or *præcipe quod reddat* being brought against him) should be *actually seised of the freehold* which is about to be conveyed.

This may, and usually is done by the tenant in tail executing a deed, or passing a fine, for the *express* purpose of making the person therein named *tenant to the præcipe*.

Much reading is to be found in the books, and great nicety seems to have been required, both as to the time and manner of conveying a legal freehold to make a good tenant to the *præcipe*.

But this is now regulated, and the doubts formerly entertained in a great measure cleared up by the statute 14 G. II. c. 20. which enacts, that "all recoveries shall be valid, notwithstanding the fine or deed making the tenant to the *præcipe* should be levied or executed after judgment obtained and writ of *seisin* awarded, provided the same appear to be levied or executed before the end of the *term* in which such recovery was suffered." And also, that "although the recovery itself do not appear to be entered, or be not regularly entered on record, yet the deed to make a tenant to the *præcipe*, and declare the uses of the recovery, shall, after a possession of *twenty* years, be sufficient evidence, on behalf of a purchaser for valuable consideration, that such recovery was duly suffered."

3d. Of the vouching.

The tenant to the *præcipe*, when counted or declared against, must *vouch*, or call upon another person who is supposed to have warranted the title to him at the original purchase, since it is by the default of the last vouchee, that the judgment or recovery is obtained.

There are *single, double, or treble* vouchers, as the case may require; and the recovery, when suffered, operates accordingly in manner above mentioned.

4th. Of the Judgment.

The entry of the judgment is: "Therefore it is considered, that the
" aforesaid I. S. do recover the seisin against the said W. B. of the tene-
" ments aforesaid, with the appurtenances, and that the said W. B. have
" of the lands of the aforesaid G. R. to the value," &c.

Judgment must not be given before the return of the writ of *entry* or *summons*.

If any of the parties demandant, tenant, or any of the vouchees, *die* before judgment, the recovery is void.

5th. The Execution.

Demandant having obtained judgment, a writ of *habere facias seisinam* is awarded to give him possession. The time when the writ should be tested and made returnable, is mentioned hereafter.

Thus is the mode of proceeding from the commencement of the suit to judgment and execution, strictly adhered to in the *fictional* suit, whereon a common recovery is founded, as if it were an *actual* real action. The judgment then remains upon record, and the claim or title of the demandant being thus solemnly ratified and confirmed, a *common recovery* becomes a settled and safe assurance or conveyance.

We shall conclude with briefly considering the mere *practical* part of the *mode of suffering a common recovery*.

HOW TO SUFFER RECOVERIES.

There are two ways of suffering recoveries. 1st. *By a personal Appearance of the Parties in court.* 2d. *By their Appearance by Attorney.* The former is the easiest and cheapest, but from certain circumstances, as distance of residence, sickness, or the like, the latter may be sometimes the most convenient.

1st. WHERE THE PARTIES PERSONALLY APPEAR IN COURT.

By the *parties*, are here properly meant the *tenant* and *vouchees*, for the *demandant* never need appear in court.

Of the Præcipe.

Make out *præcipe* for writ of entry, naming therein the *demandant* and *tenant*, the parcels, and the places where they lie; also, the names of the different *vouchers*, and whether they appear and vouch in person, or
by

by attorney. It is the practice, however, not to get writ of entry immediately thereon (though in point of regularity it still might, and perhaps ought to be done), but first to pass the recovery at the bar.

Of passing Recovery at the Bar.

Attend with the tenant and vouches at Westminster; take with you your *præcipe*, which give to a serjeant, or his clerk. Serjeant, with other serjeants, will count thereon, and sign the same. Prothonotary will enter *præcipe* in his book kept for that purpose. It will then be returned to you. The number of serjeants to count, depends upon the number of vouches, there being one serjeant to the *demandant*, another to the *tenant*, and another to each *vouchee*.

Although the actual counting by the serjeants is now disused, yet the form thereof is still preserved in the entry of the recovery; it may not, therefore, be deemed useless to give a short explanation thereof.

The count itself is little more than a repetition of the writ of entry against the tenant; to this count the serjeant for tenant answers, that the tenant is present there, and vouches to warranty A B. The serjeant for A B then asserts, that A B is present, and prays the demandant to count against him; upon which the same count, *mutatis mutandis*, is repeated. A B then vouches to warranty C D, and so on through all the vouches, against each of whom a similar count to the first is used, until at length the last *vouchee* (which is the common *vouchee*) appears and pleads thereto; upon this the demandant prays leave to *imparle*, which being granted, common *vouchee* does not afterwards appear, whereon judgment of default is obtained; all of which several counts, vouchers, plea, and imparlance, in their order, are now set forth in the entry of the recovery on the plea roll.

Of the Writ of Entry.

Having passed the recovery at bar, take copy of *præcipe* and carry it to *curfitor*, who will make out the writ of entry, which is a writ of entry *sur disseisin in le post*, as above mentioned. The writ of entry must then be carried to *alienation* office to be compounded, and afterwards to *return* office, to be returned in the same manner as the writ of covenant is compounded and returned in passing a fine.

Of the Writ of Seisin.

Before writ of entry is returned, you may prepare writ of *seisin*, which is to be signed by prothonotary, and sealed; then carry writ of *seisin*, together with writ of entry, to the *return* office, to be returned; but it is usual, for the sake of expedition, to indorse the return of the *seisin* on the writ before you carry it to return office.

☞ The day of executing the writ, by giving *seisin*, as indorsed thereon, may be any day within a reasonable time after its teste, and before the return.

When you have got the writs from the office, carry writ of entry to attorney general's chambers for his signature; pay 10s.

The writs are then completed.

Of the Teste and Return of Writ of Seisin.

The writ of *seisin* should bear *teste* the fourth day inclusive after the return of the writ of *entry*, or last writ of *summons* (when *summons* is necessary, which see post tit. *summons*, and *seisin*); and there should be 15 days between the *teste* and *return*.

Of the Entry of Recovery.

Immediately after the writ of *entry* is obtained, and during the time that the writs of *entry* and *seisin* are being passed, make out the draught of the recovery.

Get roll of *prothonotary*, and enter it thereon. It is advisable before ingrossing recovery on the roll for *prothonotary* or his clerk to peruse it, to avoid mistakes.

Of exemplifying Recovery.

The recovery is then to be *exemplified*, which is done by ingrossing same on double 5 s. stamp parchment.

Of the Nature of Exemplification.

An *exemplification* is described in *termes de la ley*, to be when a man will have any original record written out and *exemplified* forth of the court where it remains; to which purpose he may have a writ.

Accordingly, the *exemplification* of the *recovery* is a kind of formal acknowledgment tested by the C. J. of C. B. that such a recovery (stating the same) was duly suffered at the time therein mentioned, and is thereby *exemplified* at the desire of the demandant.

Of the Form of Exemplification.

It begins thus: Geo. III. &c. by the Grace of God, &c. to all to whom these our present letters shall come, greeting. Know ye, that amongst the pleas of land inrolled before Alexander Lord Loughborough, and his brethren our justices of the bench, of the term of the Holy Trinity, in the 29th year of our reign, upon the 7th roll it is thus contained, (setting forth the title, and the whole of the entry, as on plea roll: It then concludes as follows): All and singular which premises, at the request of the said A. (the demandant) by the tenor of these presents we have commanded to be exemplified: In testimony whereof we have caused our seal, appointed for sealing of writs in the bench aforesaid, to be affixed to these presents. Witness Alexander Lord Loughborough, at Westminster, the 1st day of July, in the 29th year of our reign.

It has been before observed in what manner the *teste* and *return* of the writ of *seisin* is governed by the return of the writ of *entry*, or *summons* (when one is necessary).

So the *teste* of the *exemplification* is in some measure governed by the return of the writ of *seisin*; for if the latter be *returnable* in the same term in which judgment was given, *exemplification* must be tested some time after the return thereof; but if the writ of *entry* (or *summons*) be

returnable so late in the term that the writ of *seisin* cannot come in returnable in the *same* term, but must be returnable the *next* term, then the *exemplification* must be *tested* the *last day of the term in which judgment was given*: in which case, after the award of the writ of *seisin* in the *exemplification*, instead of stating "*at which day the said demandant comes, &c. and sheriff returned the writ,*" you omit that part, and proceed from the award of the *seisin* to the conclusion of the *exemplification*, "*all and singular which premises, &c.*;" and then upon the *folding up* of the *exemplification*, or on the *label*, you indorse the *return of the writ of seisin*, "*at which day, &c.*" commonly called the indorsing of the "*ad quem diem.*"

Of examining the Proceedings, docquetting the Rolls, and signing and sealing Exemplification.

Exemplification being completed, carry it with the roll, writs, and *præcipe* passed at the bar, to *prothonotary's* office; docquet the roll in same manner as other rolls are docquetted; enter the *præcipe* on a *remembrance roll* of the term writ of entry was returnable, which *prothonotary's* clerk will give you, and shew you how to make *entry* thereof; examine the writs, entries, and *exemplifications* with the clerk, who will afterwards *sign* *exemplification*: then get it *sealed*, and recovery is perfected.

2d. WHERE THE PARTIES APPEAR BY ATTORNEY.

The *demandant* need never appear in person; the only parties therefore for whom *warrants of attorney* can be necessary, are the *tenant* and *vouches*; but as any one may be made *tenant to the præcipe*, the expence of a *dedimus* may be saved, by appointing some friend who lives in London, or who can conveniently attend at Westminster, to pass the recovery.

The mode of appearing by attorney, is by executing *warrants of attorney*, authorising the persons therein named to appear or *vouch* for such *tenant* or *vouches*. As it must be obvious that too great care cannot be taken by the legislature to prevent fraud or covin in the procuring of such *warrants of attorney*, similar precautions are used as in taking acknowledgments on passing *finis*, which have been before treated of, it being necessary that the parties giving such *warrants of attorney* should *acknowledge* the same before proper persons, who may examine them as to their consent, capacity, and the like.

There must be two attorneys appointed by the warrant, and their authority *joint* and *several*, that if one die the other may proceed.

Before whom Warrants of Attorney may be taken.

The warrants may be taken before any *judge on the circuit*, without any special authority: but the usual way is, before *commissioners* appointed by writ of *dedimus potestatem de attornato faciendo*.

Of the *Dedimus*.

This writ is not grounded on the statute of *Carlisle*, as we have before hinted the *dedimus* to take *consuance of fines* to be, that statute only extending to *fines*; but it is a writ at *common law*, whereby persons disabled from personally appearing in court might nominate attornies in their stead.

How to sue out and proceed on Dedimus.

Make *præcipe* for curfitor as before, mentioning only the names of the *commissioners* you would wish to be inserted in the *dedimus*. Having got writ from curfitor, send it to your client in the country; any *two* of the *commissioners* may take the *acknowledgment* of the warrant of attorney, which you ought to have ready written on parchment, together with a copy of the *præcipe*. When acknowledgment is taken, annex the warrant to *ded. po.* and indorse thereon, "*The execution of this writ appears in a certain schedule hereto annexed;*" which indorsement *commissioners* should sign.

The *ded. po.* being returned with warrant of attorney, take copy of *præcipe*; carry it with *ded. po. &c.* to a serjeant in court, who will get same passed.

By a rule of court, 14 Geo. III. an affidavit must be annexed to the copy of the *præcipe* and the warrant of attorney, at the time of passing such recovery, as to the due execution of the writ of *dedimus*; which affidavit must be made by some attorney, and must alledge that *he knew the parties acknowledging the warrant; that the same was duly signed at the time mentioned in the caption; that the parties were of full age and competent understanding; that the femes coverts (if any) were separately examined, and voluntarily acknowledged same; that the parties knew the intent of such warrant, and that the razures, or interlineations (if any), were made before the parties, and before the commissioners signed same; which affidavit, together with the copy of the præcipe and warrant of attorney, are afterwards to be filed in the office of inrolment of writs for fines and recoveries.*

Of the Writ of Entry, *Mittimus*, and Transcript.

Take *dedimus* and warrant of attorney to curfitor, who will make out writ of entry, *mittimus*, and transcript; after which get writ of entry compounded at alienation office.

Of the Summons.

The summons, which is a writ of *summoneas ad warrantizandum*, is used to compel the person called upon, to appear in court, and warrant the lands.

Where the *vouchee* appears by attorney, the warrant of attorney ought *strictly* to bear date *after* the *teste* of the summons, as if it had been in consequence thereof such warrant had been given. But this is held not to be material.

By statute 24 Geo. II. c. 48. summons must be *tested* the fourth day inclusive from the writ of *entry*, and be *returnable* the fourth return after the return of the writ of *entry*; by reason whereof writs of *summons* must be returnable either in the same term in which they were tested, or in the very next term; whereas, by common law, there were *nine* returns instead of *four*.

Writ of summons is to be *signed* by prothonotary, and *sealed*; as also is the writ of *seisin*. When writ of entry is *compounded*, pin writ of entry, *summons*, and *seisin*, together, and carry them to *return-office* to be returned.

Of the subsequent Proceedings.

In the mean time make out your draft of recovery, as also the *summons-roll*, and *plea-roll*; get writ of entry *signed* by attorney general, and afterwards proceed to *exemplification*, and *docquetting* rolls, and *signing* and *sealing* exemplification, as above directed.

Of stopping, and searching for, Recoveries.

To *stop* a recovery from being suffered, enter *caveat* at *prothonotary's* and *king's silver* office, when notice will be given you of the proceedings therein; but *leave of the court* should be obtained to enter such *caveat*.

Search for recoveries at *warrant of attorney's office*; though no warrant of attorney is filed there in suffering recoveries, as there is in passing fines.

Of reversing Recoveries.

The judgment in a common recovery being a matter of *record*, it can only be reversed by *writ of error*.

No one is intitled to bring such writ of error, unless he has an *immediate interest* in the lands whereof the recovery was suffered.

Nor can any thing be assigned for error which contradicts the record, therefore no incapacity in a *vouchee*, if he appeared in *person*, can be assigned; but otherwise if he appeared by *attorney*, for then any fact may be averred which would incapacitate such *vouchee* from making the warrant, or would render the recovery of no effect, as the personal disability of *vouchee*, or his death before judgment given.

☞ The doctrine of fines and recoveries is as copious as it is intricate. For further information thereon, we must refer the reader to the various books that have been written upon the subject, the design of this Analysis being merely to give a brief explanation of the *practical proceedings* in passing fines and suffering recoveries.

I N D E X.

A

A BATEMENT, plea of, 20
 _____ of suit, 43
 Ac etiam, 10. 46
 Acknowledgment of a fine, 108
 _____ of warrants of
 attorney, 119
 Action, 7. 91
 Adding new count, 94
 Affidavit, 10. 21
 Allowance of writ of error, 68
 Amendment, 93, 94
 Appearance, 9, 46. 62. 65. 79.
 89. 116
 _____ for defendant accord-
 ing to stat. 10
 Arbitration, 31. 59
 Arrest, 11.
 _____ of judgment, 41
 Assignment of errors, 70
 Attachment, 16. 46
 Attornies, 1 to 4
 _____ proceedings by and
 against, 46 to 49
 Audita querela, 60
 Autre action pendent, 95

B

Bail, common, 7. 9
 — special, 7. 11
 — putting in, justifying, &c.
 12 to 15
 — in error, 68
 — proceedings against, 54
 Bail-bond, 11. 15
 Bill, proceedings by, 45. 47. 50
 — of Middlesex, 8

C

Ca. fa. 42. 66
Ca. utlag. 78
Cause, entering for trial, 30
Caveat, 112. 121
Certificate, judge's, 32
~~attorney's, 3~~

Chirograph, 111
Cognovit actionem, 39
Compounding actions, 82
Concilium, 35. 71
Concord of a fine, 107
Confession, judgment by, 39
Constables, proceedings against, 56
Consultation, writ of, 80
Conufance, claiming, 20
Conufor, conufee, 107
Corporations, proceedings by and
against, 57
Costs, 32. 85. 101 to 104
— taxing, 42. 66. 103
Countermanding notice, 26
Customhouse officers, 56

D

Damages, 101. 103
Declaration 17 to 19. 47. 49. 63.
81
Dedimus, 108. 119, 120
Demanding plea, 23
Default, judgment by, 36
Deliberatur, 42
Demurrer, 35
Discontinuing, 95, 96
Distress, 82, 83
Distringas, 29. 61.
Docquetting entries, 28. 33. 34.
119
Dower, 61

E.

Ejectment, 63 to 67
Elegit, 42
Entries, docquetting, 28. 33, 34
Entering cause for trial, 30
Entry of recovery, 118
Entry, writs of, 115. 117
Error, 68 to 73
Excise officers, 56
Execution, 42. 116
Exemplification, 118
Exigent, 76, 77

Failure

I N D E X.

F

Failure of record, 36
False judgment, 74
Fieri facias, 42. 66
Fines, passing, &c. 105 to 113
Forejudger, 48

G

General issue, 22
Grand cape, 61

H

Habeas corpus, 31. 74
Hab. corp. jurat. 29
Hundredors, 57

I

Jeofails, 95
Imparlance, 20. 94
Incipitur, 28. 33. 35.
Infants, 56
Inquiry, writ of, 37. 38. 62.
Inrolment of fines, 112
Interrogatories, 27
Irregularities, setting aside proceedings for, 96
Issue, 25
—— entering, 28
—— rule to enter, 33
Judgment, final, 42. 62. 79. 116
—— by default, 36. 42. 79
—— on demurrer, 36
—— on warrant of attorney, 39
—— rule for, 33. 38
—— arresting, 41
—— moving for judgment against casual ejector, 64
Justices, proceedings against, 56

L

Latitat, 8
Licentia concordandi, 107
Limitation of actions, 97

M

Members of parliament, 45
Memorandum of warrant to prosecute and defend, 4. 8. 9
Money paid into court, 21
Motion, 99, 100

N

Ne admittas, 81
Ne recipiatur, 30
New trial, 40
Nisi prius record, 28
Non omittas, 8
Non pros, 39. 70. 85
Non-suit, 31
—— judgment as in case of, 40
Notice, 9. 19
Number roll, 28

O

Officers of the courts, proceedings by and against, 49
Orders, judges, 99
Original, 46. 95. 107
Outlawry, 75
Oyer, 20

P

Pannel, 29
Paper book, 25
Partition, 78
Paupers, 57
Paying money into court, 21
Paying for issue, &c. 25
Peers, 45
Petit cape, 61, 62
Pleading, time allowed for, 19
—— procuring time for, 24
Pleas, special, 22
—— double, 22
—— in bar, 21
—— in abatement, 20
—— demanding, 23
—— moving to abide by, 24
—— searching for, 23. 66
Pluries, 8
Popular actions, 82. 103
Possession, writ of, 65, 66
Post-fine, 110
Postea, 32. 42
Pre-fine, 109, 110
Prisoners, proceeding against, 49 to 54
Privilege, writ of, 48
Privileged persons, 45 to 49
Procedendo, 75
Proceedings, setting aside and staying, 96
Process,

I N D E X.

Process, 8. 10
Proclamations, 61. 106. 111
Prohibition, 80

Q

Quare impedit, 81
Qui-tam actions, 82

R

Recognizance, actions on, 55
Record, making up and passing,
28
—— trial by, 36
Recoveries, suffering, &c. 113 to
121

Refalo, 84
Rejoinder, 24
Remanets, 30
Replevin, 82 to 86
Replication, 24
Retorn' habend', 85
Reviving judgments, 88 to 90
Right, writ of, 86
Rolls, carrying in, 33. 34. 119
Rule of court, 99. 100
—— to plead, 23
—— to reply, &c. 24
—— to enter issue, 33
—— for judgment, 33. 38
Ruling sheriff, 16

S

Satisfaction, 43. 77
Scire facias, 42. 43. 55. 87
Sci. fa. qua. exec. non. 70
Searching for plea, 23. 66
Security for costs, 97
Seisin, writ of, 117
Service of process, 9
Setting aside, and staying proceed-
ings, 96
Sheriff, ruling, 16
Signing final judgment, 42. 64

Special jury, 27
Statutes of limitation, 97
Striking out special pleas, 25
Subpcena, 30
Suggestion for costs, 32
—— of the death of a party,
99
—— in prohibition, 80
—— in replevin, 85
Suing out writ to save the statute,
98
Summons, 99. 120
Superfedeas, 53. 68. 73. 77
Surrender by bail, 14

T

Taxing costs, 42. 66. 103
Tenant to the precipe, 114. 115
Terms and returns, 5, 6
Test. capias, 10
Transcript, 69. 120
Trial, 31
—— notice of, 26
—— continuing, counterminding,
&c. 26
—— putting off, 27
—— at bar, 28
—— moving for new, 40

V

Venditioni exponas, 77
Venire facias, 29
Venue, 19
Verdict, 31
View, 27
Vouching, 114. 116

W

Warrant to arrest, 11
—— of attorney, 4. 39. 95.
119
Waste 91
Witneses, 27. 30. 31

THE END.